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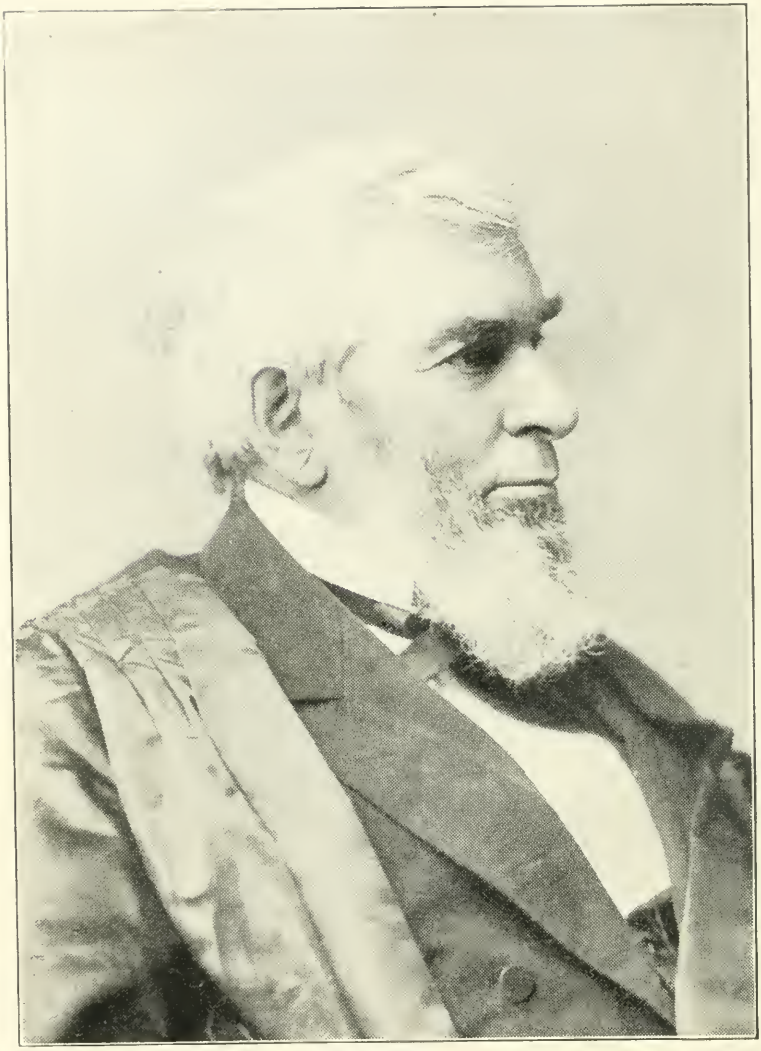

M. R. WAITE

CYCLOPEDIA OF LAW

Agency and Bailments

INCLUDING COMMON CARRIERS

PRESENTING

CLEARLY AND WITH BREVITY THE LAW GOVERNING DELEGATED AUTHORITY, SHOWING THE RIGHTS, DUTIES, AND LIABILITIES OF THE VARIOUS CLASSES OF BAILEES, INCLUDING INNKEEPERS, POSTMASTERS, TELEGRAPH COMPANIES AND COMMON CARRIERS

VOL. V

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PREFACE.

Though it may seem out of place, the author feels it his duty to call attention here to the palpable recklessness at present manifested in the exercise of both political and industrial authority. With a tendency to imperialism and militarism in government, monopoly in industry, and plutocracy in society, it is high time for the American people to recall "the ancient landmarks," and reassert the principles of individual equality and right upon which our civilization is based. Civilization accomplished by means of rifle and cannon; industrial supremacy secured by bribery, intimidation and even assassination is as threatening to human liberty now as in the past. True, it is said that "duty," "destiny" and "law" now authorize such action. But to this claim let us reply in the words of Edmund Burke to Warren Hastings: "Law and arbitrary power are in eternal enmity. Name me a magistrate, and I will name property; name me power and I will name protection. It is a contradiction in terms; it is blasphemy in religion; it is wickedness in politics, to say that any man can have arbitrary power. . . . Judges are guided and governed by the eternal laws of justice to which we are all subject."

CHARLES E. CHADMAN.

ABBREVIATIONS.

(See also the abbreviations given in previous numbers.)

Am. Dec.—American Decisions.

Am. Rep.—American Reports.

Ark.—Arkansas Reports.

Atk.—Atkyn's Reports, English Chancery.

Barb.—Barbour's Reports, N. Y. Supreme Court.

B. & Ad.—Barnewall & Adolphus' Reports, English King's Bench.

Binn.—Binney's Reports, Pa. Supreme Court.

Bosw.—Bosworth's Reports, N. Y. City Superior Court.

Burr.—Burrow's Reports, English King's Bench.

Cal.—California Reports.

C. B.—Common Bench, English Common Bench Reports.

C. & P. or Car. & P.—Carrington & Payne's Reports, Eng. Nisi Prius.

Cold.—Coldwell's Reports, Tenn. Supreme Court.

Cush.—Cushing's Reports, Mass. Supreme Court.

Dak.—Dakota Reports.

Dana.—Dana's Reports, Kentucky Court of Appeals.

Doug.—Douglas' Reports, English King's Bench.

Dutch.—Dutcher's Reports, New Jersey Supreme Court.

Esp.—Espinasse's Reports, English Nisi Prius Cases.

Fed. Rep.—Federal Reports.

Ga.—Georgia Reports.

Gratt.—Grattan's Reports, Va. Court of Appeals and General Court.

Greenl.—Greenleaf's Reports, Maine Supreme Court.
Head.—Head's Reports, Tennessee Supreme Court.
H. & N.—Hurlstone & Norman's Reports, English Exchequer.
Hawks.—Hawks' Reports, North Carolina Supreme Court.
Humph.—Humphrey's Reports, Tenn. Supreme Court.
Ia.—Iowa Reports.
Ill. App.—Illinois Appeal Reports.
Kans.—Kansas Reports.
La. Ann.—Louisana Annual Reports.
Ld. Raym.—Lord Raymond's Reports, English King's Bench.
M. & W. or Mees. & Wels.—Meeson & Welsby's Reports, English Exchequer.
Meigs.—Meigs' Reports, Tenn. Supreme Court.
Md.—Maryland Reports.
Mo. App.—Missouri Appeal Reports.
Mont.—Montana Reports.
Moo. & M.—Moody & Malkin's Eng. Nisi Prius Cases.
N. J. Eq.—New Jersey Equity Reports.
N. C.—North Carolina Reports.
N. W. Rep.—North Western Reporter.
Neb.—Nebraska Reports.
O. St.—Ohio State Reports.
Oreg.—Oregon Reports.
P.—Page.
Pa. St.—Pennsylvania State Reports.
Pick.—Pickering's Reports, Mass. Supreme Court.
Q. B.—Queen's Bench Reports, English.
Rich.—Richardson's Reports, S. Car. Court of Appeals.
Sandf.—Sandford's Reports, N. Y. City Superior Court.
Sec.—Section.
S. & M.—Smedes & Marshall's Reports, Miss. Sup. Court of Chancery.
Serg. & R.—Sergeant & Rawle's Reports, Pa. Supreme Court.
Tex.—Texas Reports.
Vt.—Vermont Reports.
W. & S. or Watts & Serg.—Watts & Sergeant's Reports, Pa. Supreme Court.
Wend.—Wendell's Reports, N. Y. Supreme Court.
W. Va.—West Virginia Reports.

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THE LAW OF AGENCY.

CHAPTER I.

THE SUBJECT OUTLINED AND DEFINED.

Sec. 551. AGENCY AS A SEPARATE BRANCH OF LAW.—The subject of Agency, though a well-known and important branch of law to-day, was scarcely recognized by the earlier Common law writers, and left undistinguished from "Master and Servant" by Blackstone.* In searching for the earliest recognition of the principles which govern the relation existing between a principal and his agent, we find in the Roman or Civil law, certain rules which correspond with the modern conception of Agency. Thus, at the Civil law if a person contracted with a son or slave on the faith of their separate estate (peculium), he had a remedy against the father or owner to the extent of the separate estate. And, in case the father or "paterfamilias" authorized the contract of the person over whom he had authority, or took advantage of it after being

*"There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial capacity; such as stewards, factors and bailiffs; whom, however, the law considers as servants pro tempore with regard to such of their acts as affect their master's or employer's property." (1 Bl. Com. 427.)

made, he was held to accept the liabilities as well as the rights under such contract. So that the father or principal who authorized or ratified the act secured the benefit and assumed the liabilities on the contract, while the person who made it, or the agent, was superseded by the principal.* But this rule of representation applied only to persons under the authority of another, and persons "sui juris," or able to contract in their own right, when employed by another, did not bind their principal directly, but only indirectly by a cession, real or feigned, of the rights acquired in the transaction.**

At the Common law, as has been seen, Agency was confounded with employment. But now, independent of assignment, Agency is recognized as the representation of one man by another. "And it would seem," says Anson, "that this liability of one for the act or default of another springs universally from the contract of employment."***

Sec. 552. SAME SUBJECT—DISTINGUISHED FROM MASTER AND SERVANT.—While an agency may be deemed an employment, the word "agency" is not synonymous with "employment." Anson explains that an agency is an employment for the purpose of bringing the employer into legal relations with a third party.**** Professor Mechem, after admitting that the difference between principal and agent

*Anson on Contracts, 329.
**Anson on Contracts, 330.
***Contracts, 330.
****Contracts, 333.

and master and servant is one of degree only, and not of kind, states that the true distinction is to be found in the nature of the undertaking, and the time and manner of its performance. "Agency," he says, "properly relates to transactions of business with third persons, and implies more or less of discretion in the agent as to the time and manner of his performance. Service, on the other hand, has reference to actions upon or about things. It deals chiefly with matters of mere manual or mechanical execution, in which the servant acts under the direction and control of the master."*

The fact that agency or the relation between principal and agent is so closely allied to that of master and servant accounts for the many principles pertaining to the latter subject, which are found in all treatises on agency. Whether agency be regarded as a higher form of service, or service as a lower form of agency, is not material to our consideration of the subject, if we bear in mind that the agent acts in a representative capacity, with authority derived from the principal.

Sec. 553. SAME SUBJECT—ITS RELATION TO CONTRACT.—We have seen in considering the

---

*Agency, Sec. 2. See also Wharton on Agency, Secs. 19, 20. This distinction corresponds with that of the Codes. Thus the California code defines an agent as "one who represents another called the principal in dealings with third persons." (Sec. 2295.) And a servant as "one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called the master." (Sec. 2009.)

subject of Contract that, as a general rule, one man cannot by contract with another confer rights or impose obligations on a third person.* Agency is an exception to this rule, as the person making the contract, the agent, represents the third person, the principal, and is employed for the very purpose of bringing the principal into legal relations with others. Hence, agency, though a form of employment, and generally arising from a contract between the parties, is not distinctly a contract relation.

Sec. 554. AGENCY DEFINED.—"Agency is a legal relation, founded upon the express or implied contract of the parties, or created by law, by virtue of which one party—the agent—is employed and authorized to represent and act for the other—the principal—in business dealings with third persons."**

An agency may be regarded as a function or employment, and consists of the power or authority which the agent has conferred upon him by the principal to deal with third persons. As between principal and

---

*No. 4. Home Law School Series, Sec. 472.

**Mechem on Agency, Sec. 1.

Other definitions of agency are: "Agency is a contract by which one person, with greater or less discretionary powers, undertakes to represent another in certain business relations." (Wharton, Agency, Sec. 1.) "Agency is founded upon contract, either express or implied, by which one of the parties confides to the other, the management of some business to be transacted in his name or on his account, and by which the other assumes to do the business and to render an account of it." (Kent Com. 2, p. 784.) "The relation between one who authorizes another to act in his stead, and the one who so acts." (Abbott's Law Dict., "Agent.")

agent the agency is a trust, as between the principal and third persons it is a power.

Sec. 555. AGENT DEFINED.—An agent is one who is authorized to act for another in dealing with third parties.* An agent is sometimes called an attorney, proxy, delegate or representative.

Sec. 556. A PRINCIPAL DEFINED.—The person from whom the agent's authority emanates, or who has the power to subsequently ratify the agent's act, is the principal. The principal is also called the employer, constituent or chief.**

Sec. 557. CLASSIFICATION OF AGENTS.—As regards the extent of their authority, agents are classified as Universal, General and Special.

---

*"Agent. One who acts for or in the place of another in virtue of an existing authority or power from him." (Abbott's Law Dict.) "An agent is a person duly authorized to act on the behalf of another, or one whose unauthorized act has been duly ratified." (Ewell's Evans' Agency, 1.)

"Agent must be distinguished from servant, which is one who acts by authority and for the benefit of another, but without standing in his place; also, from representative, which may signify (as in the case of an executor) one who was designated to act by the choice of the person whom he represents, but whose present continuing authority is derived from the law; also, from trustee, who acts in behalf of one person, in virtue of an authority derived from another." (Abbott's L. Dict.).

The Codes distinguish agencies as Actual and Ostensible: An actual agency exists where the agent is really employed by the principal; it is ostensible when the principal either intentionally, or through want of ordinary care, leads a third person to regard another as his agent who is not really employed by him. (Cal. Code, Secs. 2298-2300.)

**Story, Agency, Sec. 3.

Other divisions are: As regards the nature of the agency, Mercantile and Non-mercantile; as regards the obligation assumed by the agent, Del-credere and not Del-credere; as regards the degree of diligence which the agent must exert, agents are either Gratuitous or Paid; and as respects the skill required of them they are, Professional and Non-professional.

An universal agent is one authorized to transact all the business of his principal. It follows that a principal could have but one universal agent. It has been doubted whether such an agency could actually exist.* It can only be created by clear and unequivocal language, and is not to be inferred from general expressions, however broad.**

A general agent is one who has authority to transact his principal's business generally, or to transact all of his principal's business of a particular kind or at a particular place. Hence a principal may have a general agent in each line of his business, or at each place where he has business to do.

A special agent is one who is empowered to act only in specific transactions. Thus a principal may have as many special or particular agents as he has items of business.

A del-credere agent is one who for an extra commission guarantees the payment of the sales he makes.

These classifications are for convenience of treat-

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*Story on Agency, Sec. 21. In Barr v. Schroeder, 32 Cal. 609, a so-called universal agency came before the court.

**Gulick v. Grover, 33 N. J. L. 463, 97 Am. Dec. 728.

ment as well as of use in accurately stating the law which is based upon them.

Sec. 558. HOW IT IS DETERMINED TO WHAT CLASS AN AGENT BELONGS.—It is not always plain whether an agent's authority is general or special, and this question must be determined by the court or jury. As a rule, the existence, nature, and extent of an agency are questions of fact which the jury must determine. Where the grant of authority is in writing, or a parole authority without dispute, it is a question of law for the court.* If an agency is shown to exist, the authority is presumed general rather than limited, otherwise no presumption as to the nature or existence of an agency is made.**

Sec. 559. SPECIAL FORMS OF AGENCY.—Some forms of agency are of such importance and universal use as to have collected about them special rules of law, and these are given separate consideration by some text-writers. Under this class Professor Mechem considers attorneys, auctioneers, bank officers, brokers, factors, ship masters, etc.***

Attorneys. In the law of agency the term "attorney," or "attorney-at-law," is frequently used synonymously with agent. Generally when the authority of the agent is in writing he is styled an attorney, or "attorney in fact." The more general significance of the

*Dale v. Pierce, 85 Pa. St. 474; Dickinson County v. Miss. Valley Ins. Co., 41 Iowa, 286.

**Mechem, Agency, Sec. 9; Trainor v. Morison, 78 Me. 160.

***Agency, Secs. 10-17.

term "attorney at law" is in reference to those persons who are regularly admitted to practice in the courts, and plead the cases of others who are termed clients.

Auctioneers. An auctioneer is a person employed to offer property for sale, at public auction, after due public notice, and to sell to the highest bidder.* Originally he is the agent of the seller, but in making the sale and accepting the bid he becomes the agent of the buyer.**

Brokers. "A broker is one who, as middle-man, brings persons together to bargain, or bargains for them, in the private purchase or sale of property of any sort, not ordinarily in his possession."*** A broker is distinguished from an auctioneer in that his sales are private instead of public; he has no special property in the goods which he sells, and must sell in the name of the principal. Generally he is paid a commission or brokerage, but he may serve gratuitously. He is the agent of the person who first employs him, and cannot act for both parties unless they so desire and give their full and free consent.

Factors. Factors, also called commission merchants in commerce, are those whose business it is to receive and sell goods for a commission. A factor, unlike a broker, is entrusted with the possession of the goods he sells, and generally sells in his own name. He has a special property in the goods, and a general lien for advances. Where the factor in consideration of a higher commission guarantees the payment of the

*Wharton, Agency, Sec. 638.

**Mechem on Agency, Sec. 12.

***Bishop on Contract, Sec. 1135.

goods sold, he sells upon a Del-credere commission. When he accompanies a cargo to sell the same he is styled a supercargo.

Sec. 560. METHOD OF PRESENTING THE LAW OF AGENCY.—Having in the present chapter defined and introduced the subject which we are to treat, we shall in the succeeding chapters consider successively the following topics, into which the subject of Agency naturally divides itself: First, the formation of the relation; second, the effect of the relation when formed, including the nature, effect and execution of the authority; third, the rights, duties and liabilities springing from the relation; fourth, the termination of the relation, and, lastly, we shall consider certain special classes of agents.

Sec. 561. AUTHORITIES ON THE LAW OF AGENCY.—Prominent American authors on Agency or principal and agent are, Story, Wharton, and Mechem. The last mentioned author has compiled a very complete and useful work for practitioners, and it is also the latest work of the three. Ewell's Evans Agency is an American edition of less magnitude, but of equal merit. Wambaugh's Cases on Agency is a late work of value to the student or practitioner wishing the leading cases bearing on this subject.

CHAPTER II.

THE FORMATION OF THE RELATION.

Sec. 562. HOW THE RELATION MAY ARISE.—Agency being a relation founded upon a contract between the parties, except in those cases where it is implied by law, sometimes called an "agency of necessity," it follows that the assent of the parties may be signified by offer and acceptance, as in the case of other contracts. The authority of the agent must be conferred, and is never inherent, except in the few cases where it is said to be implied by law. There must be an intention on the one side to confer an authority, and on the other to assume the authority granted. This assent of the parties may be an offer of a promise for an act, as where the principal requests a service in such a manner as to bind himself to indemnify the person rendering it. Of this class are gratuitous agencies. So the assent may be an offer of an act for a promise, as is the case when the agent's unauthorized act is ratified by the principal, who assumed its rights and liabilities. Or the assent may be indicated by the offer of a promise for a promise, where the principal promises to employ and remunerate, and the agent promises to perform the work required of him.*

Sec. 563. PURPOSES FOR WHICH AGENTS MAY BE CREATED.—An agent may be authorized

*See Anson on Contract, Part VI.
***Agency, Secs. 10-17.

to do any act which his principal may lawfully do, except those personal actions to which the principal must give his personal attention.*

The exceptions to the general rule of the right of the principal to delegate his authority, are: 1, he cannot delegate another to do an act which is illegal, immoral or opposed to public policy; or, 2, delegate another to perform an act which is personal in its nature.**

Sec. 564. THE FIRST EXCEPTION CONSIDERED.—In general, whatever a man "sui juris" may do for himself he may do by another. But this is subject to the exception that no valid agency or contract can be created for the commission or promotion of an act which is illegal, immoral or opposed to public policy. Such an agency, if attempted, is void. The law will neither enforce performance on the part of the agent, or payment for the service from the principal, but generally leaves the parties in whatever position they may have placed themselves.***

Having already discussed the principles of law applicable to contracts opposed to public policy, or tainted with illegality or immorality of object, we shall not

*Cal. Code, Sec. 2304; Story, Agency, Sec. 6.

**Mechem, Agency, Sec. 19. There may be agencies in crimes and torts, but they are not called agencies.

***Marshall v. Baltimore & Ohio R. R. Co., 16 How. 314. But a principal may be held responsible for the acts of an agent though the real object of the agency is under disapproval. For if it is wrong to do an act it is also wrong to aid in its commission. Oscanyan v. Arms Co., 103 U. S. 261; Trist v. Childs, 21 Wall. 441.

dwell at length on the subject in this connection, and refer the student to the previous volume in this series.*

The law of Agency offers no new principles in addition to those discussed under the subject of Contract, as regards undertakings illegal in their nature, or opposed to public policy. Thus, lobbying agents, or those employed to procure or to attempt to procure or defeat legislation by use of personal solicitation, intrigue, or other undue influence with legislators, cannot enforce payment for their services. Such an agency is void as against public policy, and this though nothing improper was actually done or intended to be done. The fact that the contract has a tendency to establish corrupt methods is enough to stamp it as one which public policy forbids.** But certain services looking to the information of legislators, and which do not seek to prejudice them through personal influence, may be legitimate. Thus the collection of data, drafting of petitions, and the preparation of arguments for public submission to the legislature or to its committees, is a proper subject of employment.***

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*See Secs. 459-462, No. 4 Home Law School Series.

**Clippinger v. Hepbaugh, 5 W. & S. (Pa.) 315; 40 Am. Dec. 519.

***Mechem, Agency, Sec. 23.

Lobbying Agents. In Trist v. Child, supra, Trist claimed to have aided the National Government in securing the treaty of Guadaloupe Hidalgo, and engaged Child to recover the value of this service from the United States government. Child was unsuccessful and did not recover anything on the claim, and Trist refused to pay him for the service rendered. Child brought an action to recover for his services, consisting largely of personal influence with legislators in try-

Akin to lobbying agents are those who undertake to secure contracts through personal influence from the government, or the heads of governmental departments, and such agents, if employed to do anything further than present the bids of their employers for the public supplies, cannot enforce the terms of their agency, since such acts are contrary to public policy and void. (Tool Co. v. Norris, 2 Wall. 45.) So a contract to prosecute a claim against a municipality or government would be void for like reasons if it contemplated the employment of personal influence or persuasion, or other improper means upon the officer or body vested with authority to decide the matter. (Devlin v. Brady, 32 Barb. 518.) In like manner and for like reasons employment to compromise crimes, or

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ing to get an act passed for the payment of the claim. The court held such an agency or contract void as against public policy.

In Beal v. Polhemus, 67 Mich. 130, an agreement for the payment of a sum of money, conditioned that the payee erect a building at a stated place near the payer's property, and secure it to be occupied by the government postoffice, was held not to be void as against public policy. It having appeared that the payee, though a politician, had used no undue influence in securing the location of the postoffice, and had been guilty of no corruption or corrupt practices in the matter. This, however, is an exceptional case, and seems to be contrary to the weight of authority in such cases. See Elkhart Co. Lodge v. Crary, 98 Ind. 238; Tool Co. v. Norris, 2 Wall. 45.

The language of Mr. Justice Swayne in Trist v. Child, supra, is worthy of notice in view of the appalling amount of bribery, intimidation and corruption both by individuals and corporations which now accompanies national and State legislation. "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the

stifle prosecutions is void; so services rendered in procuring the appointment of a person to a public or private office or employment, or in improperly influencing elections cannot be upheld when sued upon. The use of open and honorable means to secure the election or appointment of a person to office is permissible. Thus a person may be employed to make speeches for a candidate or publish and circulate arguments favorable to a candidate. (Keating v. Hyde, 23 Mo. App. 555.) An agency to procure a pardon by the use of improper means would likewise be void, unless the conviction had been illegal. (Hatzfield v. Gulden, 7 Watts, 152;

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foundation is undermined the structure is weakened. When it is destroyed the fabric must fall. Such is the voice of universal history. . . . . The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interests of the agent at stake, contrary to the plainest principles of public policy. . . .

"If any one of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

"If the instances were numerous, open and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand."

Comment upon these remarks would be superfluous; every intelligent citizen, ordinarily versed in regard to current political methods, and the means employed by corporations and trusts to secure favorable legislation, will find food for thought in the words of this learned judge.

Thompson v. Wharton, 7 Bush, 563.) So services rendered in procuring or suppressing evidence, where the intention is to secure evidence at all events, and leading probably to the subornation of witnesses, are manifestly opposed to public policy, and no compensation can be collected for them. (Gillett v. Logan Co., 67 Ill. 256.) Gambling in stocks is illegal, as is an undertaking to corner, control, or monopolize the market, or prevent natural competition, and any agency or employment for this purpose is void. (Raymond v. Leavitt, 46 Mich. 447; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173.) Agreements to pay for services in corrupting or bribing the servants or agents of another, or to lead such agents to be remiss in their duty or to violate the confidence placed in them are clearly opposed to public policy and void.*

As between the principal and the agent, in order to render an undertaking void as against public policy, and prevent the agent from recovering for his services, the agent must have had knowledge of the illegal purpose or participated in it. So, where the undertaking was apparently lawful, and the agent was ignorant of the facts making it unlawful, it was held that he was not affected by its illegality. (Wright v. Crabbs, 78 Ind. 487.)

Where the agency is an entirety, and contains elements that are unlawful and others that are lawful, it cannot be so separated as to sustain the elements that are lawful; otherwise, however, if the agency is not an entirety, for in this case the lawful parts may still be

*Mechem on Agency, Secs. 20-38, and cases cited.

enforced. (Mechem on Agency, Sec. 40; Parsons, Contracts, 1, 486; Filson v. Himes, 5 Pa. St. 452.)

Sec. 565. THE SECOND EXCEPTION CONSIDERED.—A principal cannot delegate a power or authority which is of a personal nature, or which partakes of the nature of a trust or confidence, as such authority is presumed to be conferred upon considerations looking to the personal character and integrity of the individual who is expected to perform it. So an agent may not delegate a personal trust or confidence to a sub-agent; and an authority conferred by statute must be performed by the person named, if such is the intention of the act. (Mechem on Agency, Sec. 41.)

Sec. 566. WHO CAN BE PRINCIPALS.—Any person who by law is competent to act for himself, can, as a rule, act in respect to the same thing by an agent. The theory being that one can delegate his own authority, and that, though acting through an agent or "alter ego," the principal should have the same degree of competency as would be necessary to do the act in person.*

Corporations may appoint agents for the transaction of their corporate business, and in the absence of express terms, the authority to do so will be implied, since a corporation can only act through its agents, and the authority to appoint agents is a necessary incident to its existence. (Protection Life Ins. Co. v. Foote, 79 Ill. 361; Washburn v. Nashville, etc., R. R. Co.,

*"Any person having capacity to contract, may appoint an agent." Cal. Code, Sec. 2296; Dak. Code, Sec. 1338; Mechem on Agency, 43.

3 Head, 638, 75 Am. Dec. 784.) Thus, a railroad company acts through its agents and officers, and it may delegate its authority to these, if not prohibited by its charter, so far as may be necessary to effect the purposes of its creation.

If not restricted by the partnership articles, each partner has implied authority to employ the necessary agents and servants to transact the firm business, and all of the partners acting together may appoint agents to act beyond the scope of the business. See Section 526, et seq., Number 4. Home Law School Series.

Principals being required to possess such competency as is generally requisite for the making of contracts, it follows that persons lacking the requisite mental or natural capacity, as idiots, lunatics and drunken persons, and those under legal disabilities, as infants and married women, cannot, generally, appoint agents. The rules governing these classes of persons have already been discussed under the head of Contracts, and to these the student is referred.*

In certain cases, persons ordinarily incompetent to contract, may do so, and may also appoint agents to act for them. Thus, an infant may appoint an agent if he is married, and it is necessary to have an agent to manage his household affairs. So a married infant must support his wife or she may act as his agent and bind him for her contracts for necessaries. (Cantine v. Phillips, 5 Harr. 428.) Such an agency may be termed an "agency of necessity," or one created by

*No. 4. Home Law School Series, Secs. 453-7.

law. (Benjamin v. Dockham, 134 Mass. 418; Johnston v. Sumner, 3 Hurl. & Nor. 261.) At Common law a married woman could not appoint an agent, but under modern statutes she may appoint agents to deal with her separate property.

Sec. 567. WHO MAY BE AN AGENT.—All persons may act as agents except insane persons and children of tender years.* Thus, persons incapacitated to act in their own right, as monks, infants, feme coverts, persons attainted, outlawed or excommunicated, slaves or villeins, and aliens, have been held competent to act as agents. The fact that a person is incompetent to be a principal does not preclude him from being appointed as an agent. As a general rule the law has imposed no limitations on agents as regards their competency save those which the facts of the case impose. The degree of competency required depends upon the duty which the agent is expected to perform; thus, while an infant may be an agent, a burden may not be imposed upon him greater than he can reasonably bear. The principal is held responsible in his selection of agents, and if he employs incompetent persons whereby third persons are injured, he will be held to account for the acts of such agents.**

*Lyon v. Kent, 45 Ala. 656.

**"Any person may be an agent." Cal. Code, Sec. 2296; Ewell's Evans Agency, 17; Mechem, Agency, Sec. 57.

Capacity of Parties. Anson, in his work on Contracts, deals thus shortly with the competency of parties to be principals or agents: "Any one may be an agent, whether or no he is, in other respects, of contractual capacity; but no one can appoint an agent who is not otherwise capable of entering into contracts." Contracts, 332.

Sec. 568. SAME SUBJECT—INFANTS AND OTHERS AS AGENTS.—In the absence of statutory prohibitions an infant above the age of seven years may be an agent. But as between the principal and third persons, if a very young person is employed as an agent, he should be charged with only such duties as a very young person can reasonably be expected to perform. That is, the commission should be in keeping with the agent's executive ability. Further, as the infant cannot in general bind himself by a contract, the principal must be satisfied with the imperfect relation which must exist between them. Thus, the infant would be liable only for the commission of a tort or the neglect of his duty, and not for a breach of his contract obligation with the principal. (Gaffney v. Hayden, 110 Mass. 147.)

A married woman may act as an agent, and this was so at common law. (Hopkins v. Molineaux, 4 Wend. 465.) But her capacity to act as an agent was limited; the marital relation preventing her from acting in every case as a single person. Modern statutes have enlarged the contractual capacity of married women, and in many States they are now competent to carry on business, and, as a result, appoint agents as though single. A married woman may be the agent of her husband as well as the agent of third persons. She may represent her husband as an agent in two distinct ways: 1. Where he has expressly or impliedly granted her authority as in other cases of agency, and, 2, where, by reason of his failure, upon insufficient grounds, to provide for her maintenance, the law makes her his agent to secure

necessaries. It is clear that a married woman has no authority by reason of the marriage relation alone to bind her husband by contract, and persons who deal with a married woman, assuming to represent her husband do so on the condition of being forced to prove that she was empowered to represent him. The husband's authority or assent, express or implied, must be shown. (Benjamin v. Benjamin, 15 Conn. 347; 39 Am. Dec. 384.) Authority may be implied from the acts and conduct of the husband, but not from the mere fact of the marriage relation.

A husband may likewise be the agent of his wife, but the marital relation confers no authority on him to act as her agent, or in respect to her separate property. His authority must be as clear as though derived from a stranger, and be established in a satisfactory manner, because of the opportunity for undue influence and coercion afforded by the relation. (Rowell v. Klein, 44 Ind. 290; Sanford v. Pollock, 105 N. Y. 450.)

A corporation may act as the agent of any person, natural or artificial, who can appoint an agent. It should keep within the bounds of its corporate authority. (McWilliams v. Detroit Mills Co., 32 Mich. 275.)

A partnership may act as agent for any person competent to employ its services, and any partner may execute the authority for the firm, in the absence of directions to the contrary. (Deakin v. Underwood, 37 Minn. 98.)

An alien may act as an agent, but not an alien enemy. During the existence of slavery it was held that a slave might act as an agent. (Governor v. Daily, 14 Ala. 469.)

Though a person be otherwise qualified, he cannot lawfully assume an agency when, by reason of his relation to others, or on account of his personal interest, he will, or may be, put in an unfriendly attitude toward his principal. Thus, an agent cannot represent two principals whose interests are, or ought to be, hostile, without the knowledge and consent of both, and this principle applies where the agent has made himself the adverse principal.*

Sec. 569. JOINT PRINCIPALS DISCUSSED.—The authority to appoint an agent may be held by a number of persons in such a manner that the joint action of all will be necessary to bind all. Again, the principals may be so associated that one cannot act for all without having the sanction, in some form, of all his associates, such sanction not being inferrable from the joint relation itself. Principals of this sort are: Joint tenants, tenants in common, associations, clubs, societies and other voluntary associations.

In the cases of joint principals just cited, there is no implied authority of each principal to act for all, as is the case in partnerships, and unless all join in the appointment of an agent or subsequently assent to it, the appointment will bind only those who have joined in it.**

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*Ames v. Port Huron Log Driving Co., 11 Mich. 139; Fitzsimmons v. Southern Ex. Co., 40 Ga. 330; Bell v. McConnell, 37 Ohio St. 396; Hincley v. Arey, 27 Me. 362.

**Perminter v. Kelley, 18 Ala. 716; 54 Am. Dec. 177; Story on Agency, 39.

Clubs, Societies, Etc. It is quite generally conceded that clubs, societies and the like voluntary associations are not

Sec. 570. JOINT AGENTS DISCUSSED.—An agency may be conferred upon a number of persons jointly, and these persons are then known as joint agents. Joint agencies are classified as, 1, Public, and, 2, Private; the rule governing the execution of the delegated power being different in each case.

In case the business or transaction is of a private nature, all must act in the execution of the power. This is the general rule in the absence of special directions, or a plain intention to the contrary. (Cedar Rapids R. R. Co. v. Stewart, 25 Ia. 115; Hawley v. Keeler, 53 N. Y. 114.) The reason of the rule is, that the principal has granted the authority to more than one from considerations of a personal nature, and for the purpose of having the benefit of their combined intelligence, experience and judgment in the execution of

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partnerships, and their members are not liable as partners, but that their liability is determined by the rules applicable to principal and agent. (Ash v. Guie, 97 Pa. St. 493; 39 Am. Rep. 818; Flemyng v. Hector, 2 M. & W. 172.) Professor Mechem has thus summarized the rules and authorities applicable to such voluntary societies:

1. "That mere membership in such an association, society, club, or committee does not make the member personally liable upon contracts purporting to be made on its behalf, unless there is something in the charter, by-laws, or articles of association authorizing the pledging of the credit of the association, to which he is assumed to have assented by becoming a member, and then only in those cases where the contract is within the limits there prescribed.

2. "That except in the case last mentioned, the member can only be made liable upon proof of his express or implied assent to the contract; but this may be shown either by his previous consent or his subsequent adoption or by his acquiescence in an established course of dealing." (Agency, Sec. 74.)

the agency. (Commonwealth v. Commissioners, 9 Watts, 470.) Partnerships do not come within this rule, and each partner has authority to execute authority conferred upon the firm. A Joint agency terminates with the death or disability of one of the agents, unless it be coupled with an interest in the survivors. (Mechem on Agency, Sec. 77.)

When the agency is one of a public nature, or created by law, the general rule is, that a majority may execute the trust, if all have been notified and have been given the opportunity of being present and participating.*

Sec. 571. HOW AN AGENT MAY BE APPOINTED.—Except the few cases where an agency of necessity is created by law, regardless of the principal, it is the general rule that the authority of the agent must be given by the principal. Examples of authority conferred by law or necessity are, where the wife is authorized to pledge the husband's credit for necessaries, or a shipmaster to contract for necessary repairs. (Benjamin v. Dockham, 134 Mass. 418.) In all other cases the authority is derived from the will of the principal. The appointment by the principal may be express, or implied; it may be oral except in cases where a written instrument under seal is made necessary by rules of law. And the appointment may arise from the ratification by the principal of the agent's authorized acts.

Sec. 572. SAME SUBJECT—EXPRESS APPOINTMENT.—An express appointment is one

*Williams v. School District, 21 Pick. 75; 32 Am. Dec. 243; Soens v. Racine, 10 Wis. 271; McCready v. Guardians of the Poor, 9 Serg. & R. 94.

made by the voluntary and express act of the principal, as by word of mouth or by a written instrument. An oral appointment is of the same efficacy as a written one, except in those cases where a writing is made obligatory. (Story on Agency, Sec. 47.) Parol authority is sufficient to empower an agent to collect rents (Sheets v. Selden, 2 Wall. 177), and in the absence of express statutory requirements, is sufficient to authorize an agent to sell or lease lands (Lauer v. Brandow, 43 Wis. 556), and to execute written instruments not under seal (Webb v. Browning, 14 Mo. 354).

In some instances the grant of authority must be in writing, but there is no general rule of law by which these cases may be determined save that which requires an authority to execute an instrument under seal to be conferred by an instrument executed with the like formalities.

Unless the written authority demanded by the statute is required to be under seal, it need not be formal or sealed, and a mere memorandum, letter, telegram, or the like will be a sufficient writing. (Smith v. Allen, 86 Mo. 178; Brown v. Eaton, 21 Minn. 409.) An authority to execute an instrument under seal can only be conferred by an instrument under seal. (Elliott v. Stocks, 67 Ala. 336; McNaughten v. Partridge, 2 Ohio, 223.) The use of seals and the distinctions founded upon their use are constantly objected to, they are growing more and more unsuited to modern methods, but they still maintain in some cases. Thus, it is held in numerous cases that an authority to fill blanks in deeds must be conferred by an instrument under seal (Pres-

ton v. Hull, 23 Gratt. 600; Wunderlin v. Cadogan, 50 Cal. 613), but later cases disregard the rule and hold parol authority sufficient to authorize the filling in of a blank in a sealed instrument. (State v. Young, 23 Minn. 551; Mechen on Agency, Sec. 94.)

Acts done in the immediate presence of the principal or by his direction bind the principal, though such acts include the filling in of blanks in deeds or the execution of instruments under seal, and parol authority to the agent in such cases is sufficient.*

Sec. 573. SAME SUBJECT—IMPLIED APPOINTMENT.—An appointment is implied when it is not made expressly, but is inferred from the circumstances of the particular case or springs from the operation of some rule of law. An agency may be implied from the acts, words or conduct of the parties; and a mere look, word or gesture may be sufficient to express the assent of the principal to the undertaking of the agent, as is the case in dealings conducted on the exchange.

The general principle in implied agencies being that, where a principle has held out a person as his agent, and permitted such person to act as his agent, or by acts and conduct has led others to reasonably presume that such person was his agent, and duly authorized to act for him, he will be precluded from denying that such person was not his agent to the prejudice of third persons who have relied upon the apparent authority of the agent. This is called the doctrine of

*McMurtry v. Brown, 6 Neb. 368; Eggleston v. Wagner, 46 Mich. 610; Jansen v. McCahill, 22 Cal. 565.

estoppel, an equity rule based on the duty of acting in good faith, so as not to mislead others. The conclusive presumption of agency, or estoppel of the principal from denying it, may arise from active or passive conduct on the part of the principal. (Fanning v. Cobb, 20 Mo. App. 577; Commonwealth v. Holmes, 119 Mass. 195.)

The methods in which an agency may arise by implication are practically unlimited, but it is said that the implication must be based upon facts, and cannot arise from any mere argument as to the convenience, utility or propriety of its existence; and the facts upon which the agency is predicated must be given their natural, legal and legitimate effect, unexpanded or diminished in order to establish or overthrow the agency. So, too, the agency, when implied, is limited to the natural and reasonable requirements of the case, or to the performance of acts within the scope and limit of those from which the agency arose.*

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*Mechem on Agency, Sec. 85; Bickford v. Menier, 107 N. Y. 490; McAlpin v. Cassidy, 17 Tex. 449.

If one stands by and knowingly permits another to make a contract for him as his agent without denying the authority, he will be estopped from denying that the agent had authority. (James v. Russell, 92 N. C. 194.) A son who had for years been permitted by his father to sign the father's name to notes, was held to have authority to bind the father by a note so issued to parties having no notice that it was unauthorized. (Weaver v. Ogletree, 39 Ga. 586.) It is competent to show, in an action seeking to charge a married woman for goods sold her husband as her agent, that she had during the same period paid for other similar goods bought by the husband (Lovell v. Williams, 125 Mass. 439), and a husband having the management of land belonging to his wife, who orders materials to

Sec. 574. HOW A CORPORATION MAY APPOINT AGENTS.—At the common law a corporation could contract or make appointments only by a writing under the corporate seal. But this doctrine no longer prevails, and a corporation may appoint agents to perform all acts within the scope of its corporate powers by unsealed writing or by parol, or such authority may be implied as in other cases; and this rule extends to the authorization of an agent to execute a deed of corporate realty under seal. (Hemstreet v. Burdick, 90 Ill. 450; Taymouth v. Koehler, 35 Mich. 26.) The rule also extends to authority conferred by municipal and quasi municipal corporations. (Inhab. of Nobleboro v. Clark, 68 Me. 87; Mechem on Agency, Sec. 97.)

Sec. 575. PROOF OF AGENT'S AUTHORITY. —In proving the agent's authority, if it was conferred

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construct a house thereon, was held to be the agent of the wife, when the facts showed that the wife knew that the house was being built and moved in it when finished. (Arnold v. Spurr, 130 Mass. 347; Mechem on Agency, Sec. 86.)

But the making of a note payable at a certain bank will not make the bank the agent of the payee to receive payment, unless the bank officers wish to accept the agency. (Pease v. Warren, 29 Mich. 9.) And where a debtor employs an agent to take money to his creditor, the acceptance of the money by the creditor will not make the messenger his agent so as to make him liable for the loss of future sums appropriated by the agent; the loss must be borne by the debtor. (Fisher v. Lodge, 50 Iowa, 459.) Nor is authority to collect a debt to be implied from the fact that the party claiming the authority has possession of a copy of the account. (Dutcher v. Beckwith, 45 Ill. 460; 92 Am. Dec. 232.)

by writing or deed, the writing being the best evidence must be produced or accounted for. (Reese v. Medlock, 27 Tex. 120.) But the written authority is not necessary where the existence of the agency is only incidentally brought in question. In general, the agent's authority cannot be proven by his own statements or admissions (Howe Machine Co. v. Clark, 15 Kan. 492; North v. Metz, 57 Mich. 612), nor can it be proven by evidence that the agent was generally reputed to be so authorized. (Blevins v. Pope, 7 Ala. 371.) It is proof of some word or act from the principal conferring the authority that is required. To establish a parol authority by the principal, the agent may be called as a witness, and his testimony is as competent as any other witness. "But it is not competent to prove the supposed authority of an agent for the purpose of binding his principal by proving what the supposed agent has said at some previous time." (Valentine J. in Home Machine Co. v. Clark, 15 Kans. 492.)

If the authority is in writing, or the facts on which the agency is based are undisputed, it is a question of law for the court to determine the nature, extent and meaning of the authority conferred. (Gulick v. Grover, 33 N. J. L. 463; Savings Soc. v. Savings Bank, 36 Pa. St. 498.) In other cases it is for the jury, as instructed by the court, to ascertain whether or not the agency exists. (Roberts v. Pebble, 55 Mich. 367.)

Proof of the ratification of the act of another by the principal will establish the authority of the agent. But a person cannot be made to assume the authority of an agent against his will; there must be assent on the part

of the agent, either actual, or implied from his assumption of the authority.*

Sec. 576. MEANING OF RATIFICATION IN THE LAW OF AGENCY.—By ratification is meant the act of giving sanction and validity to the previously unauthorized act of one, who, in respect of such act, has assumed to act for another. This assumption may consist in the exercising of the power of an agency not created or existing, or in exceeding the scope of an authority actually conferred. In either case the supposed or alleged principal would not be liable for the act of the agent. But if he learns of the things done in his name, without, or beyond authority conferred, and sanctions or confirms them, this is ratification, and binds him for such acts.

This ratification by the principal may occur in two ways: 1. The alleged principal may expressly adopt the act done in his name as his own, as by an oral confirmation of it. Or, 2. He may so conduct himself toward the assumed agent that for the protection of innocent third persons the law will imply a ratification of such agent's acts.

Sec. 577. WHAT ACTS MAY BE RATIFIED.—The power to ratify the acts of another done in one's behalf is as broad in its scope as the power to delegate; and, conversely, if the act is one which the principal could not lawfully authorize another to do for him, he cannot lawfully ratify it. Thus, void acts, illegal acts, and acts against public policy cannot be ratified (Ar-

*Mechem on Agency, Sec. 108; Bank v. Free, 67 Ia. 11.

mitage v. Widoe, 36 Mich. 124; Harrison v. McHenry, 9 Ga. 164), but acts which are merely voidable may be ratified. A tortious act, ratified with knowledge of the facts, binds the principal the same as though founded on contract. (Tucker v. Jerris, 75 Me. 184; Griswold v. Haven, 25 N. Y. 595.)

It is in dispute whether a forgery may be ratified. Professor Mechem states that the difference in the authorities is caused by the fact that the State, as well as the party whose name is forged, has an interest in the matter. He thinks a ratification would not preclude the right of the State to punish the criminal, but would be sufficient to make valid the unauthorized writing of the principal.*

Sec. 578. WHO MAY RATIFY.—Any one who is capable of authorizing another to do certain acts for him, is capable of ratifying the same acts when they are assumed to be done in his behalf without a previous authority, and "e converso." (Wilson v. Dame, 58 N. H. 392; Pollock v. Cohen, 32 O. St. 514.)

Copartnerships and partners as well as natural persons may ratify acts done in their behalf. Persons of unsound mind, infants and others under legal disabilities cannot ratify, but when the disability is removed there is no general reason why they may not ratify acts done in their behalf during the incompetency; and the guardian, or other representative of an incompetent person, may ratify for him.

Any agent may ratify the unauthorized acts of a sub-

*Mechem on Agency, Sec. 116; Casco Bank v. Keene, 53 Me. 103; Greenfield Bank v. Crafts, 4 Allen, 447.

agent of the same principal, if such act falls within the scope of his—the superior agent's authority. (Mound City L. Ins. Co. v. Huth, 49 Ala. 530.) This rule is of importance in corporate affairs, where the acts of inferior agents are ratified by the superior agents of the same company. (Bank v. Kimberlands, 16 W. Va. 555; Cairo, etc., R. R. Co. v. Mahoney, 82 Ill. 73.)

Sec. 579. ESSENTIALS OF RATIFICATION. —That a valid ratification may be made of the act of an assumed agent by a principal, certain necessary elements or conditions must appear; these are:

1. The pretended agent must have assumed to act for some one else, that is, have acted in a representative capacity. And if the act was done in his own name and on his own authority, it cannot be ratified. (Hamlin v. Sears, 82 N. Y. 327; Beveridge v. Rawson, 51 Ill. 504.)

2. The person for whom he assumes to act must have been identified by him as some particular person. It is not necessary that he should have been with the alleged principal, neither is it essential that he should actually designate the alleged principal by name, but he must in some way distinguish him from the rest of mankind. (Watson v. Swan, 11 C. B. (N. S.) 771.)

3. The ratification of the assumed agent's acts must have been upon full knowledge of the material facts, or in voluntary and willful ignorance of them. That is, the principal being under no obligation to ratify the acts of an assumed agent, will not be bound by a ratification unless made by him with a full knowledge of all the material facts constituting the transaction, ex-

cept in those cases where he deliberately and intentionally ratified without inquiry, or without attempting or caring to inform himself of the facts. (Dodge v. McDonnell, 14 Wis. 553; Kerr v. Sharp, 83 Ill. 199; Kelley v. Newburyport, 141 Mass. 496.)

4. The unauthorized act, if ratified at all, must be ratified as a whole. The principal must take the obligations as well as the advantages. (Eberts v. Selover, 44 Mich. 519; Coleman v. Stark, 1 Oreg. 115.)*

Sec. 580. WHAT IS A SUFFICIENT RATIFICATION?—As indicated in a previous section (Sec. 576,) a ratification may be an express adoption or confirmation of the act, or implied from acts and conduct of the principal; hence ratification may be, 1, Express, or, 2, Implied.

1. Express Ratification. An express ratification may be written or unwritten, but in either case it must be the direct and voluntary confirmation of the pretended act of agency. As in the case of conferring authority originally the ratification in instances must be in writing, and in others be under seal.**

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*To the essentials above given, Professor Mechem adds that the acts claimed to effect a ratification must be of such a nature as to prejudice the rights of the party who has relied upon them if the ratification has not taken place. (Agency, Sec. 131; Doughaday v. Crowell, 11 N. J. Eq. 201.)

The burden of proving a ratification rests on the party asserting it. (Reese v. Medlock, 27 Tex. 120.)

**Dispatch Line v. Bellamy Mfg. Co., 12 N. H. 205; Grove v. Hodges, 55 Pa. St. 504. An authority to execute a writing under seal can only be conferred under seal, and in like manner the ratification of such an act can only be made under

It is held that the unauthorized execution of a deed may be expressly ratified by a power of attorney subsequently executed authorizing such act and dated so as to be prior to the date of the deed. (Milliken v. Coombs, 1 Greenl. (Me.) 343; U. S. Express Co. v. Rawson, 106 Ind. 215.) And where State laws allow authority to sell or lease land to be conferred by parol, such contracts, when made without authority, may be ratified by parol. (Mechem on Agency, Sec. 144.)

2. Implied Ratification. An implied ratification is one which the law presumes, as where the supposed principal has so acted as to lead others to believe that he sanctioned the acts of the assumed agent.

The conduct, from which a ratification may be implied, as in the case of conferring authority originally, may consist of acts, spoken words, silence when it is a duty to speak, the accepting of benefits, and the like. The sufficiency of the ratification depends upon the facts in each case, and the methods or modes in which the ratification can occur may be as various as the instances which arise. The following are instances of implied ratifications cited by Professor Mechem:

The accepting by a principal, with full knowledge of the facts, the purchase price or rent of land or other property sold by one assuming to be his agent; the vol-

seal. This rule does not prevail in Massachusetts (Holbrook v. Chamberlain, 116 Mass. 155), and is modified when applied to partnerships, so that the act of a partner in such case may be ratified by the other partner by parol. (Peine v. Weber, 47 Ill. 45.) And where the statutes have abolished the distinctions between sealed and unsealed instruments the rule has no force. (Mechem on Agency, Secs. 138-40.)

untary acceptance of the proceeds of an unauthorized discharge of a mortgage, or of a compromise; and the voluntary retention of a conveyance of land which an agent has taken from a debtor in satisfaction of a debt. These are given as instances of ratification by acceptance of benefits.

By bringing a suit at law based on an agent's act, a principal may be held to have ratified the act. Thus bringing an action on a mortgage taken by an agent, or an action to enforce a contract made by an agent, or the bringing of an action upon a note taken in payment of goods by an agent ratifies the act of the agent. (Cochran v. Chitwood, 59 Ill. 53; Beidman v. Goodell, 56 Ia. 592.)

Silence of the principal may amount to a ratification. Thus, when he is informed of the act which has been done in his name, he must elect within a reasonable time whether he will ratify or repudiate the act, and his continued silence or indifference and failure to give notice of repudiation to interested third persons, will be construed as a ratification. What constitutes a reasonable time depends upon the facts of the case and the situation of the parties.* (Lafitte v. Godchaux, 35 La. Ann. 1161; Phila. R. R. Co. v. Cowell, 28 Pa. St.

*Folger, J., in Kent v. Quicksilver Mining Co., 78 N. Y. 137, says: "We suppose acquiescence or tacit assent to mean the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress after the knowledge of the committal of it, whereby innocent third parties may have been led to put themselves in a position from which they cannot be taken without loss. It is the doctrine of equitable estoppel." See also Saveland v. Green, 40 Wis. 431; Mobile, Etc., Ry. Co. v. Jay, 65 Ala. 113.

329.) This rule of reasonable promptness in repudiating an act, where silence might operate to the prejudice of an innocent party, applies to private, municipal and quasi municipal corporations, when the act is within the scope of their powers, the same as to individuals. (Mechem on Agency, Secs. 158-9.) But some authorities hold that while this rule applies to acts of an agent who goes beyond his authority, it does not operate where the assumed agent is a mere stranger to the principal. (Ward v. Williams, 26 Ill. 447; Evans' Agency, 68.) Professor Mechem is of the opinion that the relation of the parties is not conclusive, and that a ratification may be inferred from silence, though the party is a stranger to the principal, unless the stranger acts in his own name and behalf.*

Sec. 581. CONSEQUENCES OF RATIFICATION.—As the ratification of the act of an assumed agent necessarily affects three parties—the principal, the agent, and the third party, with whom the agent has dealt—the consideration of this subject includes: 1. The effect as between the principal and agent; 2, The

*Mechem on Agency, Secs. 161, 162. Where one in the presence of the principal was allowed to sell the goods of the principal, it was held to be a tacit ratification of the act. (Owsley v. Woolhopter, 14 Ga. 124.) So where an agent without authority, but with the knowledge of the principal, sold the principal's land, and for four years the principal made no objection, but allowed the purchasers to occupy and improve it, he was held to have acquiesced in the sale. (Alexander v. Jones, 64 Ia. 207.) And a railroad company using and partly paying for materials purchased by an assumed agent will be held to have ratified the purchase. (Evans v. Chicago, Etc., R. R. Co., 26 Ill. 189.)

effect as between the principal and the person with whom the agent has dealt; 3, The effect as between the pretended agent and persons dealing with him; and, 4, The effect on third parties who have acquired rights from the principal before ratification. These topics we shall consider briefly.

1. As between the principal and the pretended agent, the ratification of the principal releases the agent from all responsibility to the principal for loss or damage from the unauthorized act. This presupposes that the agent has discovered all the material facts to his principal.* But for his tortious acts the agent is responsible as well as the principal.

2. As between the principal and the person with whom the pretended agent has dealt, an act of ratification has a retroactive effect, and operates to bind the principal, or person ratifying, the same as a previous grant of authority to the agent would have done. (Fleckner v. Bank, 8 Wheat. 338.) Every ratification relates back and is equivalent to a prior command. Having ratified the pretended act of the agent, the principal stands responsible for the whole of it, to the full extent to which the agent assumed to act, and this is

*Woodward v. Suydam, 11 Ohio, 360; Foster v. Rockwell, 104 Mass. 172; Bell v. Cunningham, 3 Pet. 69; Bank of Owensboro v. Western Bank, 13 Bush, 526. Field, Justice, in Cook v. Tullis, 18 Wall. 332, says: "The ratification operates upon the act ratified precisely as though the authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification." The ratification is retroactive and is equivalent to a previous authority. (Planters' Bank v. Sharp, 4 Smedes & M., Miss., 75; 43 Am. Dec. 470.)

so whether the ratification is of a contract or of a tort, and whether the act is of advantage or detriment to the principal. (Cooley on Torts, 127; Wood v. McCain, 7 Ala. 800.) The principal is also responsible for any fraud in the agent's act. (Lane v. Black, 21 W. Va. 617.)

A ratification as against the person ratifying is irrevocable, but where the rights of third persons may be affected, or as against the person with whom the assumed agent has dealt, the principal does not necessarily acquire affirmative rights by his mere act of ratification. Here the third party must do some assenting act after the principal has signified his approval, then both are bound.*

3. As between the pretended agent and the person dealing with him. When a person assumes to act as the agent of another, and fails to bind such other through a want of authority, he will bind himself for all loss, responsibility, or damage which he may thereby occasion to the party or parties who, in dealing with him, rely on his pretended authority. (Mechem on Agency, Sec. 180; Kroeger v. Pitcairn, 101 Pa. St. 311; 47 Am. Rep. 718.) In cases of contract the agent's responsibility ceases when the supposed principal fully ratifies the act which he has assumed to do for him Polhill v. Walter, 3 B. & Ad. 114), because the party with whom he has dealt then has what he was supposed to have—the liability of the principal—and cannot

*Mechem on Agency, Secs. 169-179; State v. Torinus, 26 Minn. 1; Dodge v. Hopkins, 14 Wis. 630; Jones v. Atkinson, 68 Ala. 167.

complain. But in cases of tort the rule is different, as all who engage in the commission of a tort are held liable to the one who suffers thereby, and it makes no difference whether they engage in the commission of the tort as under principals, joint principals, or agents. A ratification, or previous grant of authority to do the act, will involve the principal but will not relieve the agent.*

4. As between the principal and persons not parties to the unauthorized transactions, the retroactive effect of ratification will not be allowed to prejudice rights which they have gained from the principal before ratification. Thus, where the principal, prior to ratification, has conveyed the land or chattel or other thing forming the subject matter of the unauthorized contract, to another who acted in good faith, the latter's right cannot be cut off by a subsequent ratification.**

Sec. 582. THE TRANSFER OF DELEGATED AUTHORITY CONSIDERED.—We have seen (Ante, Sec. 563), that a principal cannot delegate certain kinds of authority, or the performance of certain acts. We are now to consider what acts or authority may be delegated by the agent.

Sec. 583. SAME SUBJECT—THE GENERAL RULE.—It is the general rule that delegated authority cannot be delegated, the maxim being, "Delegatus non potest delegari." That is, without authority express or

*Wright v. Eaton, 7 Wis. 595; Perminter v. Kelley, 18 Ala. 716.

**McCracken v. San Francisco, 16 Cal. 624; Pollock v. Cohen, 32 Ohio St. 514.

implied to employ a sub-agent, it is presumed that the authority given an agent is personal and cannot be delegated to another so as to bind the principal. The foundation of the rule is the presumption that a principal appoints one his agent with reference to his fitness for the intended post. (Wright v. Boynton, 37 N. H. 9; Loomis v. Simpson, 13 Ia. 532.)

Whether the authority of the agent to substitute another for himself will be implied, must depend upon the circumstances of the particular case. It is safe to say, however, that authority for an agent to delegate the execution of his trust to another will not be inferred in any case where the performance of the agent's duty involves the exercise of special care, skill, judgment or discretion (Planters Bank v. National Bank, 75 N. C. 634; Emerson v. Providence Hat Co., 12 Mass. 237); nor will such authority be inferred where personal trust and confidence is imposed. Hence it is held that the general administration of a trading company cannot lawfully be transferred to another by an agent to whom such trust has been confided. (Emerson v. Providence Hat Co., supra.) So an agent cannot delegate his power to execute commercial paper for his principal. And, an attorney cannot transfer his attorneyship to conduct a case to another without the express consent of his client. (Eggleston v. Boardman, 37 Mich. 14.)

Sec. 584. SAME SUBJECT—EXCEPTIONS TO THE GENERAL RULE.—The general rule above stated may be modified by the circumstances and necessities of the particular case, or from the usage of trade

allowing the delegation of the agent's authority. Thus, where the employment of a sub-agent is imperatively necessary, and the principal's interest will suffer if it is not done, the authority may be implied.* And the existence of a known usage or established course of dealing by which the authority to appoint sub-agents is recognized, will justify the assumption of the authority. The parties being presumed to have contracted with reference to and in contemplation of such usage.**

The power to delegate the performance of merely mechanical or ministerial acts to another, or to delegate an employment in which no skill, judgment or discretion is required may be implied. (Mechem on Agency, Sec. 193.)

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*Mechem on Agency, Sec. 194; Dorchester, etc., Bank v. N. E. Bank, 1 Cush. 177. So where a note is sent to a bank for collection, and it is necessary to protest it, such authority will be implied. (Tiernan v. Commercial Bank, 7 How., Miss., 648.) Or if a draft is sent a bank to collect at a distant point, authority is implied to appoint a subagent at the place where it has to be collected. (Appleton Bank v. McGilvray, 4 Gray, 518.)

**Smith v. Sublett, 28 Tex. 163; Laussatt v. Lippincott, 6 Serg. & R. 386; 9 Am. Dec. 440.

CHAPTER III.

THE EFFECT OF THE RELATION.

Sec. 585. OUTLINE OF CHAPTER III.—A consideration of the effect of the relation of principal and agent, the title of this chapter, properly includes the rights, duties and liabilities arising out of the relation, which will be the subject of our next chapter. Hence, it is but a partial consideration of the effect of the relation which this chapter presents. The most noticeable effect, and, in fact, the purpose of agency, is to invest the agent for the time being with the authority and power of the principal. So that a consideration of the nature, extent and effect of this authority, together with the rules governing a proper execution of the delegated powers will bring us to the topics to be considered in the next chapter. Hence, the present chapter will be devoted to a consideration of the agent's authority, and the nature, effect and execution of such authority.

Sec. 586. AGENT'S AUTHORITY CLASSIFIED AS REGARDS NATURE AND EXTENT.—In its nature, the agent's authority may be express or implied; as regards its extent, it is said to be universal, general or special. These divisions, as will be seen, assist in arranging the principles by which the nature and extent of the agent's authority is determined.

Thus, if the agent's authority be express, and the time, place and manner of its exercise clearly defined,

the limits fixed by such authority are conclusive upon all parties having notice of them. (Siebold v. Davis, 67 Ia. 561.) And where the law requires the act assumed to be done by an agent, to be performed by one having written authority, or authority under seal, parties dealing with such an agent must take notice of, and will be bound by, any limitations therein, although they have not had actual knowledge.*

An implied agency must be limited as regards the extent of the authority conferred, to the performance of like acts under like circumstances, and cannot exceed the legitimate scope of the facts from which it is inferred. (Graves v. Horton, 35 N. W. Rep. 68.)

Sec. 587. PARTY DEALING WITH AGENT BOUND TO ASCERTAIN HIS AUTHORITY.—Persons dealing with an agent are bound to ascertain both the fact and scope of the agency, and this whether it be a general or a special agency. And when either the fact or scope of the agency is denied by the principal, the burden of proof is on the party asserting it. (Rice v. Peninsular Club, 52 Mich. 87.) And we have seen in the previous chapter that the statements of the agent or his assuming to exercise the authority is not evidence of the existence of the agency.

Sec. 588. AGENT'S AUTHORITY CO-EXTENSIVE WITH EMPLOYMENT.—A principal may confer upon his agent as much or as little authority as he sees fit, but where he invests his agent with a cer-

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*Mechem on Agency, Sec. 273; Peabody v. Hoard, 46 Ill. 242.

tain representative authority or character, secret instructions restricting this power will not affect the rights of persons, who, being ignorant of such restrictions, deal with the agent in good faith, relying upon his apparent authority. (Walker v. Skipwith, Meigs, 502; Mechem, Agency, Sec. 279.)

Ordinarily, when an agency is created, authority to do those things which are reasonably necessary and proper to effect the main purpose of the grant of power will be implied.* And if in reference to the powers incidental to an agency there is a well-defined and publicly known usage, it will be presumed, in the absence of anything to the contrary, that the principal intended that such usage should govern. (Adams v. Pittsburg Ins. Co., 95 Pa. St. 348, 40 Am. Rev. 663; Frank v. Jenkins, 22 O. St. 597.) Hence, if by express approval, by recognition or by acquiescence one has held out another to the world as possessing authority to represent him in a general way in the transaction of all his business of a certain kind or in a certain place, he will

*"The authority of an agent in any given case, therefore, is an attribute of the character bestowed upon him in that case by the principal. Thus if the principal has by his express act, or as the logical and legal result of his words or conduct, impressed upon the agent the character of one authorized to act or speak for him in a given capacity, authority so to speak and act follows as a necessary attribute of the character, and the principal, having conferred the character, will not be heard to assert, as against third persons who have relied thereon in good faith, that he did not intend to impose so much authority, or that he had given the agent express instructions not to exercise it." (Mechem on Agency, 282; Carmichael v. Buck, 10 Rich. 332.)

be held to have conferred upon him the powers inherent in the character thus bestowed, namely, that of a general agent. And also where the principal in a single instance gives the agent authority, or by his conduct holds him out as his agent, he is bound by the acts of the agent within the scope of such power. (Mechem on Agency, Sec. 283; Bryant v. Moore, 26 Me. 84; Towle v. Leavitt, 23 N. H. 360; Webster v. Wray, 17 Neb. 579.)

Considerable importance is given by some authorities to the fact whether the agency is general or special in determining to what extent third persons may rely upon it. (I. Pars. Cont., p. 42.) While it is true that a special agent's authority is more limited as compared with a general agent, the distinction is of no more importance than that it serves to indicate to third persons the limitations of the agent's authority, of which they are bound to take notice. (Mechem on Agency, Sec. 285.) A general agent can only bind his principal within the scope of his authority. The fact that he is a general agent does not make him a power to himself, and he is as much bound to act within the line of his employment as a special agent. (McCoy v. McKowan, 26 Miss. 487; Reed v. Ashburnham R. R., 120 Mass. 43.)

Third persons must act in good faith in dealing with agents, and ascertain the nature and scope of their authority. If they fail to exercise the ordinary and reasonable diligence which a prudent person should in determining the agent's authority, they cannot hold the principal. (Dozier v. Freeman, 47 Miss. 647; Rust v.

Eaton, 24 Fed. Rep. 830.) The rule extends to public agents, and persons dealing with them must at their peril ascertain their authority. (Mayor of Baltimore v. Eschbach, 18 Md. 282.)

Sec. 589. THE AGENT'S AUTHORITY SUMMARIZED.—The agent's authority in dealing with third persons comprises a number of elements which are thus summarized by Professor Mechem:

1. It consists of the powers directly and intentionally conferred by the voluntary act of the principal. 2. Of those incidental powers which are reasonably necessary and proper to carry into effect the main powers conferred and which are not known to be prohibited. 3. Of those powers which usage and custom have added to the main powers, and which the parties are to be deemed to have had in contemplation at the time of the creation of the agency, and which are not known to have been forbidden. 4. Of all such other powers as the principal has, by his direct act or by negligent omission or acquiescence, caused or permitted persons dealing with the agent reasonably to believe that the principal had conferred. 5. Of all those other powers whose exercise by the agent, the principal has subsequently, with full knowledge of the facts, ratified and confirmed. (Agency, Sec. 282.) The same elements apply as between principal and agent, save that the secret limitations of power given the agent, are binding on the latter (idem).

Sec. 590. CONSTRUCTION OF WRITTEN AUTHORITY.—Agency being a relation usually springing from a contract express or implied, and the

agent's authority being a grant from the principal, it follows that the rules applicable to the construction of a contract, are likewise applicable in construing the agent's authority. We have already seen that when the authority is in writing or is to be gleaned from undisputed facts, its construction is for the court.

Ordinarily, what authority is conferred is a matter of intention, and this is true of all valid appointments, whether written, oral or arising in any other way. It is this intention which is to be discovered, and when discovered it governs. When the authority is in writing, the intention is to be gathered from the language used, and the whole writing or instrument must be construed. (Bishop on Cont., Sec. 382.) Where the authority is in writing, but the intention is not clearly to be determined from such writing, the court may consider the situation, surroundings and relations of the parties, the object being to put the court as nearly as possible in the situation of the parties, that the matter may be seen as they saw it.

The rules of evidence forbid the admission of parol testimony to vary the terms of a written instrument. But where there is a latent ambiguity, that is, one not apparent on the face of the instrument, it may be explained by extrinsic evidence. But a patent ambiguity, that is, one appearing in the writing itself, cannot be thus explained. (Bishop on Cont., Sec. 375.) So, where the subject matter of the agency is not described with certainty in the writing, it may be identified by parol evidence. (Norris v. Spofford, 127 Mass. 85.) But in general, parol authority is not admissible to en-

large the authority conferred by the principal. Otherwise, however, where the principal has held the agent out to third parties as possessing greater authority than was contained in the writing. (Mechem on Agency, Sec. 301; Coleman v. Bank, 53 N. Y. 388.)

Where authority is given an agent to transact business, in the absence of anything tending to show a contrary intent, it will be construed to authorize him to transact the business according to the laws of the place where it is to be done. (Owings v. Hull, 9 Pet. 609.) The entire instrument is to be given effect, if possible; and the authority will be sustained where possible.

Though the agent's authority is general in terms, it will be construed as applying only to the principal's private and individual business, in the absence of anything confirming the wider authority. (Camden Safe Dep. Co. v. Abbott, 44 N. J. L. 257.) And a general authority will always be limited to the specific object to be accomplished or contemplated. (Rossiter v. Rossiter, 8 Wend. 494.) Every formal instrument conferring a power is to be strictly construed, and be limited to the powers expressly given and those necessary and proper to carry out those expressly given.*

The principles of construction stated in the last paragraph also apply where the authority is not in writing, but is express and limited.

Sec. 591. CONSTRUCTION OF IMPLIED AUTHORITY.—An implied authority equally with one

*Mechem on Agency, Sec. 308; Bank v. Schaumburg, 38 Mo. 228; Craighead v. Peterson, 72 N. Y. 279; 28 Am. Rep. 150.

expressly given, is not to be extended beyond its proper scope, and is limited to the principal's business. But an implied authority carries with it as an incident, the power to do those things which are necessary and proper in order to accomplish the essential purposes of the agency. (Star Line v. Van Vliet, 43 Mich. 364; McAlpin v. Cassidy, 17 Tex. 449.)

It is the duty of the principal to furnish reasonably clear instructions to his agent, and if he fails so to do he cannot be heard to complain that his agent has pursued one course instead of another, if he has done so in good faith and acted with proper diligence and prudence. (Ireland v. Livingstone, L. R. 5 H. L. 395.) The agent or others, in construing an ambiguous authority, may treat it as a plain person, acquainted with the object in view, and with reasonable attention to the language used, would treat it. (Very v. Levy, 13 How. 345.)

Sec. 592. APPLICATION OF THE PRINCIPLES OF CONSTRUCTION.—It is our purpose in this section to give briefly some general applications of the rules of construction and interpretation.

Where the Authority Is to Sell Land. A power of attorney in the following words is held not to give authority to sell land: "To act in all my business, in all concerns, as if I were present, and to stand good in law, in all my land and other business" (Ashley v. Bird, 1 Mo. 640), nor will the following power authorize the sale of land, "to make contracts, settle outstanding debts, and generally to do all things that concern my interest in any way, real or personal, whatsoever, giving

my said attorney full power to use my name to release others or bind myself, as he may deem proper and expedient" (Billings v. Morrow, 7 Cal. 171); nor the words, "to act for him with reference to all his business" (Coquillard v. French, 19 Ind. 274). But a letter authorizing the receiver to manage the writer's property as his own, and expressing a desire to sell, was held to empower the agent to contract for the sale of real estate but not to sell. (Lyon v. Pollock, 99 U. S. 668.) And a power, otherwise sufficient, will not be held invalid as authority to sell realty because it does not mention the specific property the agent is to sell (Marx v. Given, 23 Me. 55), unless the authority is limited to a portion of the principal's property, and is indefinite. (Lumbard v. Aldrich, N. H. 31.)

In general, the authority must be exercised within the time directed; and authority to sell "immediately" will not justify a sale a month later. (Matthews v. Sowle, 12 Neb. 398.) Nor will a general authority to sell at a stated price, authorize a sale three years later at the same price, the land having improved in value. (Proudfoot v. Wightman, 78 Ill. 553.)

Authority to sell, where the word is used in its ordinary sense, confers the power to execute the proper instruments required by law to carry the sale into effect. (Valentine v. Piper, 22 Pick. 85.) And generally the authority to sell land implies authority to insert the usual covenants of warranty (Peters v. Farnsworth, 15 Vt. 155), but not to warrant quality or quantity, or to mortgage. (Na. Iron Armor Co. v. Bruner, 19 N. J. Eq. 331; Jeffrey v. Hurst, 49 Mich. 31.)

The authority to sell, empowers the agent to receive the purchase price if paid down, but not to receive subsequent payments. (Mechem on Agency, Sec. 324.) And the authority to sell does not imply power to sell on credit, or to trade or exchange for other property, the presumption being that the sale is to be for cash. (Lumpkin v. Wilson, 5 Heisk. 555; Reese v. Medlock, 27 Tex. 120.) Mere authority to sell will not authorize the agent to dedicate any part of the land to the public use, as for streets, otherwise if the authority included the power to plat and subdivide and record the plat. (Gosselin v. Chicago, 103 Ill. 623; Wirt v. McEnery, 21 Fed. Rep. 233.) And the power to sell gives no implied power to invest the proceeds. (Stoddard v. United States, 4 Ct. Cl. 516.)

Where the Authority Is to Sell Personal Property. This authority may be both express and implied, but does not arise from the mere possession of the property by the agent. (Levi v. Booth, 38 Md. 305.) The authority to sell personalty implies the power to receive payment in certain cases, as where it is the custom to pay a clerk for goods bought of him for cash, but where the agent is simply a solicitor of orders or sells by sample, as a traveling salesman, or has possession of the bill, his authority to receive payment is not to be implied from such fact. (Hirshfield v. Waldron, 54 Mich. 649; Dutcher v. Beckwith, 45 Ill. 460; Ranney v. Boyd, 30 Minn. 319.)

Possession, with authority to sell and deliver, empowers the agent to receive payment. (Seiple v. Irwin, 30 Pa. St. 513.) If notice is given to the purchaser of the

fact that the agent has no authority to receive payment he must be governed thereby, but such notice must be palpably brought to his attention. Where the notice of the agent's lack of authority was stamped upon the bill in red ink it was held sufficient. (McKindly v. Dunham, 55 Wis. 515.) But in Putnam v. French, 53 Vt. 402, where a bill sent with goods sold by agent was stamped in red, "All bills must be paid by check to our order or in current funds at our office," and the bill was later paid to the salesman, who embezzled the funds, it was held that the buyer not having seen the notice, and the notice not being so prominent as to be a distinctive feature of it, he was not bound by it.

The agent has implied power to hire transportation for himself and his wares or samples in the course of his employment; to warrant the quality of the articles he sells in the usual and ordinary manner, or according to a well-known and settled custom. (Huntley v. Mathias, 90 N. C. 301; Talmage v. Bierhause, 103 Ind. 270; Herring v. Skaggs, 62 Ala. 180.) In general he has no authority to give credit, to trade or barter, to appropriate the goods to his own use, as to pay his own debt, or to pledge or mortgage the goods. (Mechem on Agency, Secs. 352-361.)

Where the Agent's Authority Is to Purchase Property. If the agent is furnished funds for the purpose of buying goods for his principal, he cannot bind him by purchasing on credit, in the absence of custom or unless the principal with knowledge of his act ratifies it; otherwise, however, if he is not supplied with funds.

(Adams v. Boies, 24 Ia. 96; Sprague v. Gillet, 9 Metc. 91.)

Such an agent has implied authority to arrange the terms and prices for the purchase, but must follow instructions as to the quantity to be bought as well as the kind or quality. (Olyphant v. McNair, 41 Barb. 446.) And he may be limited to dealing with certain designated persons. The agent may make the necessary statements as to the principal's credit and solvency, where he is expected to buy on credit. (Hunter v. Hudson River Co., 20 Barb. 493.)

Where the Agent Is Empowered to Receive Payment. The agent's authority to receive payment may be express or implied, but is not to be implied from the mere fact that the contract on which the payment is made was negotiated through him. (Thompson v. Elliott, 73 Ill. 221.) But where an agent who has made a contract for the principal is given possession of the securities, and no other directions made as to payment, his authority to accept payment is implied. (Haines v. Pohlman, 25 N. J. Eq. 179.) The debtor can only rely upon such implied authority while the agent remains in possession of the securities, and must satisfy himself at each payment that such is the case. (Smith v. Kidd, 68 N. Y. 130.)

An agent to receive payment for the principal can take nothing but money, and his acceptance of a note, draft, merchandise, or other commodity in lieu of cash will not bind the principal. (Mechem on Agency, Sec. 375; Robinson v. Anderson, 106 Ind. 152; Aultman v. Lee, 43 Ia. 404; Rhine v. Blake, 59 Tex. 240; Butts v.

Newton, 29 Wis. 632.) Such an agent has no authority to release or compromise the debt, or set off a claim due from himself. (Herring v. Hottendorf, 74 N. C. 588.) He has implied power to receive part payment on the account, but may not extend the time of paying the balance in consideration of part payment. (Mechem on Agency, Secs. 377-8.) If his authority is to receive but the interest he cannot discharge the principal debt; nor when authorized to receive the principal, can he accept it before due, in the absence of a custom or usage allowing it. (Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157.)

Authority to receive payment implies power to employ counsel, sue, issue execution and seize property when it becomes necessary to do so to collect the claim; this follows from the general rule that every power carries implied authority to do the things necessary and usual to accomplish the purpose of the grant. (Joyce v. Duplessis, 15 La. Ann. 242; Ryan v. Tudor, 31 Kans. 366.)

Where the Authority Is to Make and Indorse Negotiable Paper. Such authority is to be strictly construed, and can be conferred only by direct authority of the party to be bound, or by necessary implication from the character or duties given the agent. (Paige v. Stone, 10 Metc. 160.) Authority to adjust the principal's business in a State; to sign the name of a farmer in such farmer's general business; to run a grocery store, to clerk in a grocery store, to manage a farm, to superintend a mine, or manage the principal's business generally, will not confer the power to execute nego-

tiable paper in the name of the principal. (Mechem on Agency, Sec. 391, and cases cited.)

Where the power is clearly given, it will be confined to the legitimate scope of the employer's business, or within the limits fixed by the express authority conferred. Thus, if the authority is to draw on the principal's funds, the agent may not draw on the principal's credit (Breed v. First Natl. Bank, 4 Colo. 481), and authority to draw and discount a note for a stated purpose will not authorize the making and discounting of a note for a different purpose. (Nixon v. Palmer, 8 N. Y. 398.) Authority to draw checks on a certain bank does not empower the agent to overdraw the account (Union Bank v. Mott, 39 Barb. 180), and power to sign a note as surety will not justify the agent to sign it as a principal. (Farmington Bank v. Buzzell, 61 N. H. 612.)

An agent will bind his principal in filling in a negotiable instrument indorsed in blank by the principal and given him to fill up, if the persons with whom he deals had no notice of the limitations imposed upon the agent's authority as to the amount. (Davis v. Lee, 26 Miss. 505.)

Where the Authority Is to Manage a Business. "In general terms it may be said that such an agent has implied power to do those things which are necessary and proper to be done in carrying out the business in its usual and accustomed way, and which the principal could and would usually do in like cases if present." (Mechem on Agency, Sec. 395; German Fire Ins. Co. v. Grunert, 112 Ill. 68.)

Thus the managing agent may buy stock to replenish

that sold or used in the business, and may pledge the principal's credit therefore. (Banner Tobacco Co. v. Jenison, 48 Mich. 459.) While it is held that the station agent of a railway company whose employment is to receive and forward freight may bind the company by contract to furnish a stated number of cattle cars on a given day to a person who has no knowledge of the limitations of his power, it is also held that such an agent, or a yardmaster or conductor has no implied power to employ a physician or surgeon to attend an injured employe of the same company who is working under his supervision. (Harrison v. Mo. Pac. Ry. Co., 74 Mo. 364; Tucker v. St. Louis, Etc., Ry. Co., 54 Mo. 177.)

The managing agent of a business has authority to sell the produce of the business and collect therefore (Sentell v. Kennedy, 29 La. Ann. 679.), and where absolutely necessary he may borrow money to continue the business (Bickford v. Menier, 107 N. Y. 490), but he has no implied power to accept, indorse, or make negotiable paper to bind his principal, or to pledge or mortgage the property, or to sell the land, or change the nature of the business. (Mechem on Agency, Secs. 398-404, and cases there cited.)

Sec. 593. HOW THE AGENT'S AUTHORITY IS TO BE EXECUTED.—Having ascertained that an agent acts for and on behalf of his principal, it is clear that it is the first duty of an agent, in the execution of the power conferred upon him, to secure the principal the benefit sought through the agency and to impose upon him all the responsibility arising therefrom. The

agent should act within the scope of his authority, and in the name of the principal, but it is not always easy to define with precision the exact limitation of his powers. While acting within the scope of his authority the only question for the agent is the execution of the authority in the proper manner. He should so execute the authority as to bind the principal, but he may bind himself instead, or fail to bind either. Where he exceeds the authority conferred upon him and the excess is separable, the part which was authorized may stand, otherwise if the excess is not separable. (Drumright v. Philpot, 16 Ga. 424.) And a slight or immaterial variance from his authority in the execution of the power may not invalidate the act. So, where there is a complete execution of the authority, and out of abundant caution something is added which is not authorized, the execution is incomplete. (Huntley v. Mathias, 90 N. C. 101; Baum v. DuBois, 43 Pa. St. 260; Marland v. Stanwood, 101 Mass. 470; Thomas v. Joslin, 30 Minn. 388.)

Sec. 594. SAME SUBJECT—IN THE CASE OF SEALED INSTRUMENTS.—When the agent assumes to bind the principal by the execution of an instrument under seal, as by deed, bond, and the like, he must in general be governed by the technical rule of the common law, which requires that the instrument show upon its face that it is made, signed and sealed in the name of the principal.*

It is held under this rule that, though the agent de-

*Mechem on Agency, Sec. 419; Stone v. Wood, 7 Cowan, 452.

scribes himself as agent, or adds the word "agent" to his name, where the binding words of the instrument purport to be those of the agent and not of the principal, that the mere description as agent will not be enough to release the agent or bind the principal on whose behalf he assumes to act; the words being considered as mere "descriptio personae." (Stinchfield v. Little, 1 Greenl. 231, 10 Am. Dec. 65.) The rule, however, does not require any particular form of words to express the fact that the act is done in the name of the principal, and whether in the form A B, by C D, his attorney, or C D for A B, it is held that the act is apparently and manifestly in the name of the principal. (Wilks v. Back, 2 East 142; Redmond v. Coffin, 2 Dev. Eq. 437.) Thus a bond executed by a number of persons, who executed it in their individual names, but added, "Trustees of the Baptist Society of the Town of Richfield," was held to be the bond of the individuals who signed it, and not of the church or society, the addition of "Trustees," etc., being considered as mere "descriptio personarum." (Taft v. Brewster, 9 Johns. 334.) But a lease signed, "John Hammond for B. B. Mussey (Seal)," was held to be well executed for Mussey as principal. (Mussey v. Scott, 7 Cush. 215, 54 Am. Dec. 719.)

In the case of public agents or officers making contracts in the fulfillment of their official duties, the presumption is that the contract is not a personal one but made on behalf of the public, and unless the intent of the officer to bind himself is clear, it will not be con-

strued as his individual contract. (Hodgson v. Dexter, 1 Cranch, 345.)

In Wood v. Goodridge, 6 Cush. 117, it was intimated that a mortgage executed by an agent who simply signed the name of the principal and added nothing to indicate that it was the act of an agent would be invalid, on the ground that the authority conferred is to execute the deed as attorney but in the name of the principal, and this authority is not followed unless it appear in the instrument. But the rule attempted to be laid down in this case has been repeatedly denied in other and later cases. (Forsyth v. Day, 41 Me. 382; Devinney v. Raynolds, 1 Watts & Serg. 328.) And it is firmly established that where the deed in the granting part shows that it is the deed of the principal by his agent or attorney, the agent may sign the principal's name and seal alone. (Berkey v. Judd, 22 Minn. 287.)

It has been seen in previous sections that if the principal is present and authorizes the act, parol authority is sufficient, and in such case the agent may simply sign the principal's name without indicating that it is done by an agent. But a deed once executed cannot be changed by parol evidence, as to discharge the agent and bind the principal, unless it is ambigous. (Shuetze v. Bailey, 40 Mo. 69.)

Sec. 595. SAME SUBJECT—IN THE CASE OF SIMPLE CONTRACTS.—Where a simple contract is executed by an agent for a principal it ought to purport somewhere in the instrument, that it is executed for another, who, in the same instrument, is in some way identified. Beyond this statement there can be no

general rule, as the circumstances in each case have an important bearing.*

In the execution of promissory notes the agent should sign the instrument in the same manner as has been indicated for the proper execution of a writing under seal to avoid all uncertainty and ambiguity. Thus, "John Doe, by Richard Roe, his attorney or agent;" or, "John Doe, by his attorney or agent, Richard Roe." Other forms held sufficient are, "Richard Roe, for John Doe," and, "For John Doe, Richard Roe." (Tucker v. Fairbanks, 98 Mass. 101; Tiler v. Spradley, 39 Ga. 36.) But "Richard Roe, agent of John Doe," is "descriptio personae" and insufficient (Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101), and "agent for" was held to be a personal description on a note signed "D. H., agent for the Churchman" (DeWitt v. Walton, 9 N. Y. 571; Mechem on Agency, Sec. 432.)

It is held that while proper and desirable it is not imperative that the agent's name should appear on a note or bill, and he may execute it by simply signing the

* "In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the act of the agent. If he expresses this, the principal is bound, and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal, or to exempt the agent from personal liability." (Gray, J., in Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101.)

name of the principal. (First Natl. Bank v. Gay, 63 Mo. 33.) But the name of the principal, though stated in the body of the instrument, must also appear or be signed to the draft or bill (Mechem on Agency, Sec. 435; Hypes v. Griffin, 89 Ill. 134), unless the mention of the principal's name in the body of the instrument is followed by words evidencing that it is executed on the principal's behalf, and the signature of the agent indicates his representative capacity. (Andrews v. Estes, 11 Me. 267.)

Failure on the part of the agent to disclose his principal, or name him on the face of the instrument, binds the agent, though he add "agent," "President," "trustee," or other descriptive word to his signature. (Robinson v. Kanawha Val. Bank, 44 O. St. 441; Davis v. England, 141 Mass. 587; Bank v. Cook, 38 O. St. 442; Exchange Bank v. Lewis County, 28 W. Va. 273.)

An agent of a private individual must follow the same rules laid down for the making of promissory notes or other negotiable instruments when he indorses a note, if he wishes to bind the principal and not himself. But the agent or officer of a corporation is subject to a different rule, and may sign his name followed by "Cashier," "President," "Treasurer," or the like designation, and bind the company or corporation of which he is an officer or agent. (Hager v. Rice, 4 Colo. 90; Houghton v. First National Bank, 26 Wis. 663.) And in some cases public agents who issue notes in the exercise of their official duties are treated more leniently as regards binding themselves personally than mere private agents. (Mechem on Agncy, Sec. 440.)

While it is stated that "the question of the admissibility of parol evidence to show who was intended to be bound by an instrument executed by an agent is one not free from difficulty," and that "the decisions are in conflict,"* yet a very helpful and accurate set of general principles are deduced by the same author as governing the admission of parol evidence in two classes of cases: 1. Where the rights of the immediate parties to the instrument only are involved. 2. Where the rights of third persons are involved. (Idem, Sec. 443.)

General Rules. Professor Mechem lays down the following rules: 1. Where the paper on its face shows that it is the indenture of the agent alone, and no reference is made to his representative capacity, parol evidence is not admissible to relieve the agent. (Collins v. Buckeye State Ins. Co., 17 O. St. 215.)

2. When the obligation on its face is clearly the obligation of the principal, parol evidence is not admissible to charge the agent. (Falk v. Moebs, 127 U. S. 597.)

3. When the paper contains some reference to a principal, and yet is not so clear in its terms as to be construed according to one of the two rules already given, extrinsic evidence of intent may be admissible under the following conditions:

i. As between the immediate parties parol evidence is admissible to show: (a) That by a course of dealing between them, the parties, a particular form of execution had come to be the recognized and adopted form by which the principal was to be bound. (Gerber v.

*Mechem on Agency, Sec. 441.

Stuart, 1 Mont. 172.) (b) That the instrument was, to the knowledge of the parties, intended to be the obligation of the principal, and was given and accepted as such. La Salle Na. Bank v. Tolu, Etc., Co., 14 Ill. App. 141.) (c) That an instrument which is so ambiguous in its terms as to render it uncertain whose it is, was known to be intended to be the obligation of the principal. (Kean v. Davis, 21 N. J. L. 683.)

ii. As between one of the original parties and a third party, such evidence is admissible on the lines of proof just mentioned: (a) When the third person is not a bona fide holder. (Metcalf v. Williams, 104 U. S. 93.) (b) When the instrument has not sufficient evidence upon its face, or is so ambiguous or deficient as to put a reasonably prudent man upon inquiry.

4. As between the principal and the agent, it is competent for the agent to show that what is supposed to be his obligation is in fact that of the principal. (Lewis v. Brehme, 33 Md. 412; Mechem on Agency, Secs. 443-4.)

In the execution of all simple contracts the question whether the agent has so executed the authority as to bind the principal is a question of intention, and is to be gathered from their contract, interpreted with reference to their surroundings, circumstances, and customs. (Merchants Bank v. Bank, 1 Ga. 418.) The rules discussed under negotiable instruments are applicable to other contracts, and an agent may bind himself personally by engaging in his own name, though he uses a descriptive term, unless his representative character clearly appear. (Simonds v. Heard, 23 Pick.

120, 34 Am. Dec. 41; Texas Land & Cattle Co. v. Carroll, 63 Tex. 48.) And where the agent has clearly bound himself, parol evidence is not admissible to discharge him, but if the contract is uncertain or was apparently signed in a representative capacity, parol evidence is admissible to show intention to bind the principal and not the agent. (Deering v. Thom, 29 Minn. 120.) For the purpose of binding the principal, whether upon an oral or written contract made by his agent, parol evidence is admissible, even where it is not admissible to relieve the agent. (Byington v. Simpson, 134 Mass. 169; Mechem on Agency, Sec. 449.)

CHAPTER IV.

THE RIGHTS, DUTIES AND LIABILITIES SPRINGING FROM THE RELATION.

Sec. 596. SCOPE OF THE CHAPTER.—It is now in order to consider the effect of the relation, whether actual or assumed, upon all the parties connected or concerned with it, as regards their rights, duties and liabilities thereunder. A consideration of the effect of the agency upon the parties in this sense is conveniently divided into the following topics: 1. The duties and liabilities of the agent to the principal. 2. The duties and liabilities of the agent to third persons. 3. The duties and liabilities of the principal to the agent. 4. The duties and liabilities of the principal to third persons. 5. The duties and liabilities of third persons to the agent. 6. The duties and liabilities of third persons to the principal.*

Sec. 597. 1. DUTIES AND LIABILITIES OF AGENT TO HIS PRINCIPAL.—The agent is the representative of his principal, is his other self during the existence of the agency, and because of this it is the agent's duty to so demean himself that he may represent his principal with loyalty, fidelity and candor, free from all secret or antagonistic interests which might prejudice the claims which the principal has to his un-

*Mechem on Agency, Sec. 452.

biased services.* Thus, in protecting the loyalty of the agent to the service of the principal, the courts will not permit him to be the agent of two persons, whose interests are, or ought to be, antagonistic, without the consent of both; nor permit him to use the agency for his own private purposes. (Bunker v. Miles, 30 Me. 431.) So, if authorized to purchase property for his principal, he cannot purchase it for himself, directly or indirectly, and if he does so he will be treated as holding the property in trust for his principal. (Cameron v. Lewis, 56 Miss. 76; Rose v. Hayden, 35 Kans. 106.) And where an agent or clerk of a warehouseman secretly secures a lease of the premises occupied by such warehouseman, knowing that his principal desires to renew the lease, he will be held to have secured the same for the principal, and be compelled to convey the same to his principal. (Gower v. Andrews, 59 Cal. 119, 43 Am. Rep. 242.)

For the same reason an agent given authority to sell his principal's property cannot sell to himself, or with

* "So careful is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal, or the like. All such transactions are void, as it respects the principal, unless ratified by him with a full knowledge of all the circumstances. To repudiate them he need not show himself damnified. Whether he has been or not is immaterial. Actual injury is not the principle the law proceeds on in holding such transactions void. Fidelity in the agent is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal." (Manning, J., in People v. Township Board, 11 Mich. 222.)

authority to lease, lease to himself, and if he does so the transaction is void unless affirmed by the principal upon full knowledge of the facts. (Louisville Bank v. Gray, 84 Ky. 565.) Likewise, an authority to purchase property or lease it for the principal precludes the agent from buying or leasing of himself, unless with the knowledge and approval of the principal. (Taussig v. Hart, 58 N. Y. 425.) And in either case the principal need not show himself damaged in order to repudiate the transaction, it is void because of the evil tendency. (Michoud v. Girod, 4 How. 503.)

These rules are applicable to public and quasi-public agents as well as private ones, and have the same force when the agent attempts to do the forbidden act in an indirect manner. (Mechem on Agency, Secs. 463-4.)

Sec. 598. SAME SUBJECT CONTINUED.—An agent employed to settle a claim will not be allowed to avail himself of the benefit of a favorable settlement, by purchasing the claim himself at a discount and enforcing it against the principal for the full amount. In such case the benefit of the discount will be held to inure to the principal. (Noyes v. Landon, 59 Vt. 569.) Neither can the agent acquire rights against the principal through his, the agent's negligence, as by purchasing the principal's land at tax sale, where it was the agent's duty to have paid the taxes. (Ellsworth v. Cordrey, 63 Ia. 675; Woodman v. Davis, 32 Kans. 344.)

All profits made by an agent in the execution of his trust are held to belong to the principal, whether they accrue through the performance or neglect of his duty. And in case the principal has engaged the entire time of

the agent, any wages earned by the agent outside of the employment belong to the principal. (Aetna Ins. Co. v. Church, 21 O. St. 492; Merriman v. David, 31 Ill. 404; Stoner v. Weiser, 24 Ia. 434.)

Sec. 599. SAME SUBJECT—AGENT'S DUTY TO OBEY INSTRUCTIONS.—Agency being a form of employment, it follows that the agent is bound to obey the wishes and instructions of the principal, if they are reasonable and legal. The effect of disobeying the instructions of the principal depends upon the result of the disobedience. The agent is liable for the losses caused. Where the disobedience affects the manner of the excution only, the damage will be merely nominal, but may justify a revocation of the agent's authority. Where the principal is injured by the disobedience of the agent he has an action for all legitimate and proximate damages caused him by the agent. (Whitney v. Merchants' Union Ex. Co., 104 Mass. 152.) Thus, an agent instructed to insure the principal's goods, assumes the risk if he neglects to do so. (Sawyer v. Mayhew, 51 Me. 398.) And if instructed to sell for cash, he accepts a check, he is responsible if the check is worthless, and a custom to treat such check as cash will not protect him. (Mechem on Agency, Sec. 475; Hall v. Storrs, 7 Wis. 253.) The action of the principal for the disobedience of the agent is usually in assumpsit or a special action on the case, but where the conduct of the agent amounts to a conversion, trover may be maintained.*

The agent is not bound to perform an act which is

*Mechem on Agency, Sec. 476. "The result of the authori-

illegal or immoral, and may disobey instructions requiring the performance of such acts. (Brown v. Howard, 14 Johns. 119.) And in case of accident, or sudden emergency, the agent may overstep his instructions if prudence and discretion warrant his so doing. (Dusar v. Perit, 4 Binn. 361.) And a gratuitous agent, not under a legal duty to perform a service, may refuse to perform it as a whole, since there is no consideration for his promise to perform. (Thorne v. Deas, 4 Johns. 84.)

Sec. 600. SAME SUBJECT—AGENT'S DUTY TO EXERCISE SKILL AND CARE.—It is the duty of every agent to perform his undertaking with that degree of skill, care and diligence which the nature of the undertaking, and the time, place and circumstances of the performance reasonably demands, and any failure to perform this duty constitutes negligence for which the agent will be held responsible in damages. (Mechem on Agency, Sec. 490; Whitney v. Martine, 88 N. Y. 535.) The degree of care to be exercised by the agent is thus made to depend upon the circumstances of the particular case. Where the agent undertakes an

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ties may be said to be that if the agent parts with the property in any way or for any purpose not authorized, he is liable for a conversion; but if he parts with it in accordance with his authority, but sells it at a less price, or misapplies the proceeds, or takes inadequate security, he is not liable for a conversion of the property, but only in an action for damages on account of the misconduct. In such cases the question of good faith is not involved. A wrongful intent is not an essential element of the conversion. It is enough if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it." (Idem, Sec. 476.)

employment requiring professional skill, he is presumed to warrant that he possesses and will exercise such skill. And he is liable for not exercising such skill in the employment, unless the principal knew that he did not possess it, or the undertaking was gratuitous. In the latter case he will not be responsible unless he is grossly negligent. (Stanton v. Bell, 2 Hawks, 145; Story on Bailments, Sec. 435; Grant v. Ludlow, 8 O. St. 48.)

Attorneys, physicians and others who hold themselves out to the public as possessing the skill and ability necessary to exercise their profession or business, are liable to those who employ them, for the exercise of such skill, whether they have been paid or not. (Shills v. Blackburne, 1 H. Bl. 158; McNevins v. Lowe, 40 Ill. 209.)

An agent employed to make collections must exercise all reasonable skill, care and diligence to secure the money, and must employ all the remedies usual and proper for the purpose. Thus, negotiable paper should be presented promptly for payment, and if not paid, as promptly protested; and for failure in this duty, he is liable for the damages caused. (Bank v. Bank, 77 N. Y. 320; Chapman v. McCrea, 63 Ind. 360.) If the agent has employed a sub-agent by authority of the principal, he is not responsible for the acts of such sub-agent unless he has been negligent in selecting a proper party. Otherwise, if he employs such sub-agent without authority and on his own account. (Mechem on Agency, Sec. 513.)

A bank employed as agent to collect commercial pa-

per is liable for the neglect of its own officers and agents, but its liability for the neglect of notaries and other banks employed to assist in the collection is a disputed question. In a number of States the bank is made responsible for the neglect of the notary, he being considered the agent of the bank. But the better rule is said to be that if the bank exercises due care in selecting a competent notary, it will not be liable for his neglect in the matter. (Mechem on Agency, Sec. 514; contra, Ayrault v. Bank, 47 N. Y. 570; Bank v. Ober, 31 Kans. 599.) In New York and a number of other States the bank is also held responsible for the neglect of a correspondent bank to whom it has transmitted the paper, as such bank is held to be the agent of the transmitting bank and not of the owner or depositor of the paper. In a greater number of States the rule is different, and the bank is only bound to select a suitable and competent agent or bank, and then the neglect or default of such agent or bank is the loss of the owner of the paper. This latter rule prevails in Massachusetts, Connecticut, Maryland, Illinois, Wisconsin, Iowa, Mississippi, Pennsylvania, and other States. The former rule maintains in Ohio, Michigan, New Jersey, Montana, Indiana, and is the rule in the U. S. Supreme Court, and in England. (Mechem on Agency, idem.)

An attorney is liable for the defaults of his immediate assistants, and also for the neglect or default of a correspondent at a distant place to whom he sends a claim for collection, unless he expressly limits his liability. (Bradstreet v. Everson, 72 Pa. St. 124; Cum-

mins v. Heald, 24 Kans. 600.) And the same rule applicable to attorneys holds good as to the liability of mercantile or collection agencies who make a business of forwarding claims for collection. (Bradstreet v. Everson, supra; Weyerhause v. Dun, 100 N. Y. 150.) But such an agency may limit its responsibility by express agreement with the owner of the claim. (Sanger v. Dun, 47 Wis. 615.) The same rules are said to apply to express companies. (Mechem on Agency, Sec. 517.)

A del credere agent, or one who for added compensation guarantees the payment of the sales he makes, is held by some decisions to be a surety only for the debtor, but in the majority of cases he is held to be liable to the principal as though he were the purchaser, and not merely as being collaterally liable. (Lewis v. Brehme, 33 Md. 412.)

Sec. 601. SAME SUBJECT—AGENT'S DUTY TO ACCOUNT FOR RECEIPTS OF THE AGENCY.—The agent must account to the principal for all money or other property received through his employment, as the profits belong to the principal solely. And it is a general rule in the law of agency that an agent may not dispute his principal's title. Thus, having undertaken the agency by the validity of which he has received the property of the principal, he will not be allowed, when called upon by the principal to account for it, to do so by denying his principal's title. (Collins v. Tilloum, 26 Conn. 368.) But he may show that it has been taken from him by one claiming under a title superior to that of the principal, that the principal's title

has terminated, or has been transferred to another. (Mechem on Agency, Sec. 525.) He should keep his principal's property separated from his own, and keep full and clear accounts of the principal's business. (Williams v. Williams, 55 Wis. 300; Clark v. Moody, 17 Mass. 145.)

Sec. 602. SAME SUBJECT—AGENT'S DUTY TO NOTIFY PRINCIPAL.—It is the further duty of the agent to seasonably notify his principal of every fact coming to his knowledge in reference to the agency which might be material for the principal to know, in order to advance or protect his interests. (Arrott v. Brown, 6 Whart. Pa. 9.)

Sec. 603. 2.—THE DUTIES AND LIABILITIES OF THE AGENT TO THIRD PERSONS.—It is the general rule that third persons cannot recover damages from an agent for the neglect or non-performance of a duty which the agent owes the principal. (Henshaw v. Noble, 7 O. St. 231; Labadie v. Hawley, 61 Tex. 177.) How, then, is the agent liable to third persons? His liability to third persons arises either from the fact that he has so contracted as to bind himself, or because he has failed to exercise a proper regard for the rights and privileges of others while in the prosecution of his agency. In the latter case he is held responsible, notwithstanding the act is one authorized by the principal, since the law in protecting the rights of the public demands that he who does the act shall be equally responsible with him who authorized it. In the former case his liability arises from contract, in the latter from his torts or wrongful acts.

Sec. 604. SAME SUBJECT—IN CONTRACT.—When an agent represents to the party with whom he deals that he is authorized to act for another when he is not, he makes himself liable to such party for any loss which the latter sustains by reason of such want of authority; and this rule applies whether the agent acts in good faith or not, and whether he has expressly misrepresented his authority or only acted so that his authority is presumed. (Kroeger v. Pitcairn, 101 Pa. St. 311; Bartlett v. Tucker, 104 Mass. 336.) But where the agent makes known to a party all the facts of his agency or authority, he will not be liable for any presumed excess of authority. In this case the third party cannot be misled, as he has all the facts of the case, and can satisfy himself as to the agent's authority. (Newman v. Sylvester, 42 Ind. 112; Mechem on Agency, Sec. 546.) The contract which the agent assumes to make for the principal must be one which would be legally enforceable against the principal if it had been authorized by him, or the agent will not be liable. (Baltzen v. Nicolay, 53 N. Y. 467.) And a public agent who discloses the source of his authority, or who is known to be such by the party with whom he deals, will not be holden for exceeding his authority unless there is actual fraud or misrepresentation on his part. (Perry v. Hyde, 10 Conn. 329.)

While there is some dispute as to the proper action to bring against the agent where his liability is asserted, it would seem that when he makes the contract in the name of the principal, and as his contract, knowing that he has no authority for so doing, an action on the

case for misrepresentation is the appropriate remedy. But where the agent acts in good faith, believing that he has authority, or uses apt words to bind himself, or secures goods on his own responsibility, he may be held liable upon the contract in assumpsit. (Mechem on Agency, Secs. 549-550; Hall v. Crandall, 29 Cal. 567; Ogden v. Ranmond, 22 Conn. 379.)

Though the agent have authority to do the act which he assumes to do for the principal, he may execute it so defectively that the principal will not be bound. In such cases, if he has used apt language, he will be held to have bound himself, otherwise he will neither bind himself nor the principal, and the contract will be a nullity. For knowingly executing the power in a defective manner he might be held for deceit. (Mechem, Sec. 553.)

When an agent conceals the fact of his agency and acts as though he were the principal, he becomes liable in the same manner and to the same extent as though he were such principal. (Bickford v. Natl. Bank, 42 Ill. 238; Beymer v. Bonsall, 79 Pa. St. 298.) To avoid the responsibility of a principal, the agent should discover the fact of his agency and not leave it for others to discover. (Baldwin v. Leonard, 39 Vt. 260.) So, where an agent assumes to represent a principal who has no legal existence or responsibility, he renders himself personally liable for the contract. Thus, the contract of a committee of a political party or meeting for a public dinner, was held to bind the committee, as there was no responsible or existing principal. (Eichbaum v. Irons, 6 Watts & Serg. 67, 40 Am. Dec. 540.)

Where an agent has been paid money for the use of his principal by mistake, and, before notified of the mistake, he has paid it over to the principal, he will not be liable to the party who paid him the money; otherwise, however, if he is notified of the mistake before the money is paid over.*

For money paid by the principal to the agent with instructions to pay the same to third persons, such third persons cannot generally sue the agent to recover, as the principal may at any time withdraw the money from the agent or revoke his authority. (Hicks v. McCarty, 38 Mich. 667, contra, Burr v. Beers, 24 N. Y. 178.) The agent may so assent to the payment of the money to the third person as to prevent the principal from withdrawing it, and in this case he will be bound to pay it in an action. (Williams v. Everett, 14 East, 582.)

Sec. 605. SAME SUBJECT—IN TORT.—An agent is not liable to third persons for the neglect or non-feasance of those duties which he owes primarily to his principal, as they are owing to the principal and none but he can complain. Under this rule it is held that an agent is not liable to others who are damaged

*Donald v. Napier, 14 Ga. 89; Upchurch v. Norsworthy, 15 Ala. 705; Elliot v. Swartwout, 10 Pet. 137. And where the situation of the agent has been changed, before notice of the mistake, so that he will lose if the payment is not held good, the party must look to the principal for reimbursement. (Mechem, Agency, Sec. 562.) He is liable for money so paid him, though turned over to the principal, if the third person did not know of the agency. (Smith v. Kelley, 43 Mich. 390.) Also for all money obtained by his fraud, compulsion or extortion. (Ripley v. Gelston, 9 Johns. 201.)

by his neglect to keep his principal's building in repair, or to keep open a drain of the principal. (Delaney v. Rochereau, 34 La. Ann. 1123; Feltus v. Swan, 62 Miss. 415.) But for malfeasance, by which is meant wrongdoing, or active negligence in the performance of his duties, the agent is liable to those who are injured thereby. *

Sec. 606. SAME SUBJECT—PUBLIC AGENTS. —The rules fixing the liability of agents to third persons, which have just been presented, are applicable to private agents, as distinguished from public agents or officers. Public officers or agents owe their duty primarily to the public, and it is the general rule that they do not become liable to individuals for neglect or violation of their public duties. But in case they owe a duty to a particular individual which duty is ministerial in nature, and does not involve judgment or discretion in its exercise, they do become liable to the individual for any damage or injury sustained by him.

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* "But an agent, like any other person, is bound in the performance of his duty to his principal to recognize and respect the rights and privileges of others, and if he fails to do so, either negligently or intentionally, and thereby causes injury to a stranger, he is liable to the stranger for the damages sustained, and the fact that the injury occurred while in the performance of his agency will constitute no defense. In certain of such cases the principal will be liable also, but that fact does not relieve the agent." (Mechem, Agency, Sec. 571).

"No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence, in respect to duties imposed by law upon him in common with all other men." (Bermudez, J., in Delaney v. Rochereau, supra.) See Ante, Sec. 582.

(Moss v. Cummings, 44 Mich. 359; Mechem, Agency, Secs. 577-595.)

Sec. 607. 3.—DUTIES AND LIABILITIES OF THE PRINCIPAL TO THE AGENT.—The agent being in the employ of the principal is entitled to compensation for his services, also to be indemnified for his authorized acts. In addition to these claims upon the principal, he is entitled equally with other servants to be protected from injury in prosecuting his employment, and for his advantage in securing his compensation the law allows him a lien upon the goods of the principal when in his possession. These claims of the agent upon the principal we shall discuss in their order.

Sec. 608. SAME SUBJECT—DUTY TO COMPENSATE THE AGENT.—The duty of the principal to compensate the agent may arise either by express or implied agreement. When such agreement is express or is in writing it speaks for itself and is conclusive. Whether a promise to pay an agent for his services is implied or not depends upon the circumstances of the case. In general the law will not imply a promise to pay for services rendered each other by near relatives, as the presumption is that such services are inspired by motives of affection and not for pecuniary gain; and in order to overcome this presumption an express promise must be shown. (Hall v. Finch, 29 Wis. 278.) So the mere fact that services have been rendered will not justify the implication of a promise to pay for them. (Chadwick v. Knox, 31 N. H. 226.) To imply a promise to pay for services they must have been rendered under such circumstances that the duty and

intention to pay for them may be inferred. (Seals v. Edmondson, 73 Ala. 295; Cincinnati, Etc., R. R. Co. v. Lee, 37 O. St. 479.) A subsequent ratification of an unauthorized act gives the agent a right to compensation. (Wilson v. Dame, 58 N. H. 392.)

The amount of compensation which the agent is to receive may be also express or implied. And where the agreement is express its terms must govern. Where there is no express agreement fixing the amount of compensation, a promise to pay what the services are reasonably worth will be implied. In such case a reasonable value of the services must be ascertained from the facts and circumstances of the employment, with reference to these elements; the nature of the undertaking and its hazards; the duties imposed and the amount involved; the skill, ability and reputation of the agent; the results secured; the preliminary work and preparation; the actual amount of time consumed; the customary price, and the like. (Eggleston v. Boardman, 37 Mich. 14; Stanton v. Embrey, 96 U. S. 548.)

Sec. 609. SAME SUBJECT—WHEN THE AGENT IS ENTITLED TO HIS PAY.—The agent having fully performed his undertaking is entitled to his compensation. The agent may agree with the principal that full performance shall be a prerequisite to the payment of any compensation, and where such an agreement has been fairly made it will be enforced, unless full performance has been defeated by some act of the principal.*

*Jones v. Adler, 34 Md. 440; Irby v. Lawshe, 62 Ga. 216; Love v. Miller, 53 Ind. 294. "Thus an agent who is employed

And though the fruits of an undersaking are to be considered in determining the amount of an agent's compensation where the salary is implied, the mere fact that the business accomplished by the agent has proven profitless to the principal will be no defense to the agent's claim for compensation.

Whether an agent is entitled to pay when his authority is revoked before complete performance, depends mainly upon whether the agency has been rightfully or wrongully terminated by the principal. If the principal has rightfully revoked the agent's authority he may still be liable to pay him for services already rendered, but may offset any claims for damages which the agent's misconduct may have caused him. (Massey v. Taylor, 5 Cold. (Tenn.) 447; Carroll v. Welch, 26 Tex. 147.) In cases of an agency made determinable upon the happening of a contingency, or at the will of the principal, where there has been no misconduct on the part of the agent, he is entitled to reasonable compensation for the work done, as well as to be reimbursed for any outlays he may have made in regard to the agency. (Chambers v. Seay, 73 Ala. 372.) But where for gross neglect or misconduct in the course of the agency his authority has been revoked, the agent is not entitled

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to procure a loan for his principal is entitled to his commission when he procures a lender, ready, willing and able to loan the money upon the terms proposed. His right to his commission does not depend upon the contingency of the principal's acceptance of the loan, but upon his performance of his part of the contract, and the principal cannot deprive the agent of his commission by refusing to accept the loan when secured." (Mechem on Agency, Sec. 62; Vinton v. Baldwin, 88 Ind. 104.)

to any compensation. (Sumner v. Reicheniker, 9 Kans. 420.)

If the agent's authority is wrongfully revoked by the principal, as where he is discharged without cause, when the agency is not terminable at the will of the principal, he is entitled to compensation for all services rendered, as well as for those to be rendered in the future by way of damages for being wrongfully deprived of a lucrative employment. The remedies of the agent for a wrongful discharge by the principal are the same as those for the breach of a contract of service.* When an agent is wrongfully discharged it is his duty to exercise reasonable diligence in seeking and obtaining other employment, and thus to reduce his damages as much as possible. But he is not under obligation to accept any other employment that may be offered; the other employment that it is his duty to accept is one of the same general nature as the one he has been discharged from. (Utter v. Chapman, 38 Cal. 659; Williams v. Chicago Coal Co. 60 Ill. 149; Wolf v. Studebaker, 65 Pa. St. 459.) Nor is an agent wrongfully discharged by his principal bound to seek employment in a new locality, or with an objectionable employer in order to reduce his damages. (Harrington v. Gies, 45 Mich. 374; Strauss v. Mertief, 64 Ala. 299.) The right

*No. 4 Home Law School Series, Sec. 497. The remedies being: an action for the value of the services rendered; an action for breach of contract and damages; or at the end of the time set for the agency to continue, he may sue for damages or compensation for the entire period. (Richardson v. Eagle Machine Co., 78 Ind. 422; James v. Allen Co., 44 O. St. 226.)

of action accrues to the agent when he is discharged; also when the principal wholly repudiates the agency there is an immediate right of action.*

The agent may acquiesce in his discharge, and then the principal is not liable for damage; but such acquiescence is not to be implied from the fact that the agent, without protest, surrenders his trust. (Mechem on Agency, Sec. 625; Boyle v. Parker, 46 Vt. 343.)

When the agency is revoked by operation of law, as by the death, insanity or bankruptcy of the principal, the agent has no claim to future wages or damages. (Yerrington v. Greene, 7 R. I. 589.) When the agency is terminated by the death, sickness or incapacity of the agent, he or his representatives are entitled to recover for services rendered, and this applies to cases in which the payment was contingent upon the entire performance. (Ricks v. Yates, 5 Ind. 117.) But the principal may offset damage for failure to perform entire contract.

Whether an agent is entitled to compensation when he abandons his agency, depends upon whether the agency was rightfully or wrongfully abandoned. If the abandonment was justifiable the agent may recover full compensation for his services up to the time of the abandonment at least, and in cases he may recover further compensation by way of damages. Thus, if the agency was terminable at the option of the agent, he may recover for services rendered, and if abandon-

*See No. 4 Home Law School Series, Sec. 494; Dugan v. Anderson, 36 Md. 567.

ment was caused by misconduct of the principal he may also recover damages. (Patterson v. Gage, 23 Vt. 558; Winship v. Base Ball Assoc., 78 Me. 571.) If the agent wrongfully abandons his agency, whether he is entitled to compensation or not depends upon the circumstances of the case and the nature of the agency. Thus, if the undertaking is an entire one, so that a complete performance is a condition precedent to payment, the general rule is, that the agent by abandonment of the agency, abandons his compensation.* On the other hand, if the undertaking is not entire, or, as it is sometimes expressed, is severable, the agent may recover compensation for such services as he has rendered; subject, however, to reduction for all damages he has caused the principal.

What will amount to an abandonment by the agent is to be determined by the facts and circumstances of the agency. If a mere temporary absence of the agent from the employment caused no loss, it will not be an abandonment. (Shaver v. Ingham, 58 Mich. 649.) So where an agent is compelled to abandon his agency through sickness, or because a dangerous epidemic

*Cutter v. Powell, 6 T. R. 320; Schnerr v. Lemp, 19 Mo. 40; Smith v. Brady, 17 N. Y. 173; Hogan v. Titlow, 14 Cal. 73; Larkin v. Buck, 11 O. St. 561. But a more liberal rule is announced in some cases, and the agent is given such compensation as he has earned, less the damages which his breach of duty has caused the principal, or less the amount necessary to complete the service undertaken. (Mechem on Agency, Secs. 636, 637; Britton v. Turner, 6 N. H. 481; s. c. 26 Am. Dec. 713.) This equitable rule prevails in Mich., Ia., Neb., Kan., Tex., Ind., Mo. and Mich.

prevails in the vicinity of his work, such abandonment will be excused. These misfortunes are treated as the result of inevitable accident, or acts of God for which the agent is not responsible. (Jennings v. Lyons, 39 Wis. 557; Lakeman v. Pollard, 43 Me. 463.) And where the agent has stipulated that the agency will not be terminated without notice, a violation of this agreement will not forfeit his right to all compensation, unless this is also stipulated. Where it is so stipulated and the forfeiture is not out of proportion to the principal's loss, the stipulation will be respected. (Hunt v. Otis, 4 Metc. 463; Richardson v. Woehler, 26 Mich. 90.) Equity will not enforce a forfeiture, a court of law may or may not, according to the circumstances. (Hughes v. Wamsutta Mills, 11 Allen, 201.)

Where the agent acts for the adverse party, without the knowledge or consent of the principal, he is held to forfeit all right to compensation from his principal, as such action is a breach of the duty owing to the principal. (Steiger v. Hollington, 17 Mo. App. 382; Walker v. Osgood, 98 Mass. 348; Bell v. McConnell, 37 O. St. 396.) And for the same reason he cannot recover from the second employer, if he was ignorant of the previous relation. (Bell v. McConnell, supra.) And if the second employer was a party to the fraud upon the first principal, then his contract with the agent is void as against public policy. (Idem.) But where such double agency is fully known and approved by both principals, the agent may recover compensation from them both. (Adams Mining Co. v. Senter, 26 Mich. 73.)

An agent is not entitled to pay for extra services,

in the absence of a custom authorizing it, unless there is an express or implied promise to pay for such services. (Mechem on Agency, Sec. 646.)

Sec. 610. SAME SUBJECT—DUTY TO REIMBURSE AND INDEMNIFY THE AGENT.—An agent is entitled to be reimbursed for all proper outlays and expenses incurred by him in the course of the employment for the benefit of the principal. But this does not extend to expenses made necessary by the fault or neglect of the agent, or arising because he has not used due care and diligence. (Godman v. Meixsel, 65 Ind. 32; Maitland v. Martin, 86 Pa. St. 120.) And the agent is also entitled to be indemnified by the principal against the consequences of all lawful acts which he does in the course of, and within the scope of his agency. (Moore v. Appleton, 26 Ala. 633.) Where the act is unlawful the agent is liable, since he is presumed to know what is lawful and is obliged to refuse to perform such acts. (Coventry v. Barton, 17 Johns. 142.)*

Sec. 611. SAME SUBJECT—DUTY TO PROTECT THE AGENT FROM INJURY.—In general the principal's duty toward his agent in regard to protecting him from injury in the course of his employment, is the same as that of a master toward his servant, a subject already discussed in a previous number

* "Wherever, then, the agent is called upon by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong, the law implies a promise on the part of the principal to indemnify the agent for such losses and damages as flow directly and immediately from the execution of the agency." (Mechem, Sec. 653.)

of this series.* Thus the principal is bound to provide suitable machinery, employ competent servants, etc., and will be liable for any neglect of such duties. The agent being held to assume, as does the servant, all the ordinary risks incident to his employment, including the negligence of fellow servants.**

Sec. 612. SAME SUBJECT—THE AGENT'S LIEN.—For the protection of his right to compensation, indemnity and reimbursement, the agent is given a lien by the common law.***

A lien is the right of detaining the property of another until the claim, which is the basis of such right, is satisfied. (Ames v. Palmer, 42 Me. 197.) Such liens are either general or particular.

A general lien is the right to retain the property of another to cover and secure a general balance due from the owner to the person who has the property in his possession. (McIntyre v. Carver, 2 Watts & Serg. 392.)

A particular lien, also called a specific lien, is the right to detain particular property for the charges incurred or services rendered in respect of such property. (Evans, Agency, 363; Mechem, Agency, 673.)

Particular liens are favored by the law, but a general

*No. 3 Home Law School Series, Sec. 399.

**See Mechem on Agency, Secs. 655-671; principal liable for dangerous premises, Coombs v. New Bedford Cordage Co., 102 Mass. 572; duty to warn the agent of concealed dangers, Dowling v. Allen, 74 Mo. 13; duty to repair machinery, Missouri Furnace Co. v. Abend, 107 Ill. 44, 47 Am. Rep.

***The lien of the agent upon his principal's property is now also protected and defined by statutes, and may also be created by express agreement between the parties. It is the common law lien which is being here considered.

lien is not favorably regarded and can only exist by express contract, or where it has been judicially acknowledged as incident to a particular trade or business. (Mechem on Agency, Sec. 673.)

A lien does not create or vest title in property; it is simply a right of detention. It is purely personal to the lien holder, and is not subject of assignment or attachment as his property. (Lovett v. Brown, 40 N. H. 511.)

Being a mere right to retain property as security, it follows that possession of the property is the foundation of, and absolutely essential to the existence of a lien at common law. (McIntyre v. Carver, 2 Watts & Serg. 392; Miller v. Marston, 35 Me. 152.) This possession must have been acquired in a legal manner, and not wrongfully or without the consent of the owner. (Randel v. Brown, 2 How. 406.) It must be continuous, and if terminated, as by a voluntary surrender to the owner or others for him, it is lost. But a temporary surrender of possession without intention to release the lien, will not affect it; and this is so if the property is taken from the lien holder by fraud and the like; in such case, if he regains possession, the lien revives. (Bigelow v. Heaton, 6 Hill, N. Y. 248; Robinson v. Larrabee, 63 Me. 116.) The possession must also have been acquired in the course of the lien holder's employment or by virtue of his position, and the lien does not attach to property otherwise in his hands. (Dixon v. Stanfeld, 10 C. B. 398; Scott v. Jester, 13 Ark. 438.) So the parties may expressly or impliedly agree that there shall be no lien, and if such is the con-

tract the lien is waived. (Farrington v. Meek, 30 Mo. 578.) So the lien may be waived by conduct of the party entitled to it, inconsistent with its existence, as where he claims the goods on other grounds. (Holbrook v. Wight, 24 Wend. 169.)

The possession of property under a lien does not authorize the lien holder to sell it in the absence of statute permitting such sale. The lien being merely a right to retain can only be enforced by seizure and sale upon execution, as in other cases. But in case the lien results from a bailment or pledge, the property may be sold at public sale by such lienholder, and a factor may also sell goods to repay advances made upon them. (Mechem on Agency, Sec. 683; Parker v. Brancker, 22 Pick. 40.)

Generally speaking, an agent has a lien for his commission, disbursements, and services, on such of the principal's property as is entrusted to him. (Muller v. Pondir, 55 N. Y. 325.) Some classes of agents, as bankers, factors and attorneys, may have a general lien, but usually the agent's lien is a particular lien, unless by usage, or special agreement, a general lien is acknowledged. (Barry v. Boninger, 46 Md. 59.) The lien operates only for liquidated and certain claims, and not for future and speculative claims or damages. The claim must be owing the agent and be due from the owner of the goods held. (Story on Agency, Secs. 364-5.)

An additional security given an agent who makes himself personally liable for his principal's benefit, is the right to stop goods while they are in transit to the

principal, upon learning that the latter has become insolvent. This is called the right of stoppage in transitu.*

The right of stoppage in transitu does not exist if the shipment is to cover a balance due the principal by the agent, nor if the agent is a mere surety for the principal. (Ewell's Evans, Agency, Sec. 377.) And this right of stoppage in transitu must be exercised in the same manner, and may be lost by the same contingencies, as in the case of a vendor. (Mechem, Agency, Sec. 687.)

Sec. 613. SAME SUBJECT—DUTIES OWING SUB-AGENTS.—When the agent has, by express or implied authority from the principal, employed a sub-agent, such agent becomes the agent of the principal, and his rights are to be determined as in the case of the first agent himself; the principal being obligated to him in the same general way. But if such sub-agent has been employed without authority, he is only the agent of the agent, and must look to him for compensation and indemnity, and not to the principal of the agent employing him. The sub-agent may, in certain cases, be entitled to a lien on the principal's goods for

* "An agent who has made himself liable for the price of goods consigned by him to his principal, by obtaining them in his own name, and on his own credit, may stop them while in transit if the principal becomes insolvent. The principle upon which this rule is based is that the relation of the parties under such circumstances is rather like that of vendor and vendee than of principal and agent." (Mechem on Agency, Sec. 687; Newhall v. Vargas, 13 Me. 93.)

advances, though the agent had no authority to employ him. (Story on Agency, Secs. 389-390.)

Sec. 614. 4. THE DUTIES AND LIABILITIES OF THE PRINCIPAL TO THIRD PERSONS.—A principal may become liable to third persons in two characters: 1. As an undisclosed principal; 2, As a disclosed principal. Again, the agent may bind him in contract, or in tort, for wrongs committed within the scope of the employment.

Sec. 615. SAME SUBJECT—UNDISCLOSED PRINCIPAL.—For acts done in his own name without disclosing his principal the agent is primarily liable, but his action having been in fact for a principal, the latter, when discovered, may, at the option of the party with whom the agent has dealt, if exercised within a reasonable time, be held liable on all simple contracts made in his behalf by the agent, though the credit was given to the agent under a misapprehension as to his true character. (Mechem on Agency, Sec. 699; Merrill v. Kenyon, 48 Conn. 314.)

The application of this rule is subject to the following exceptions:

1. Where the status of the account existing between the principal and the agent has been altered to the prejudice of the principal, before the other party has elected to hold the principal, he will not be liable. That is, where the principal has paid the agent, or settled with him in good faith, believing from the facts or circumstances that the agent has settled with the other

party, he will not be liable. (Thomson v. Davenport, 9 B. & C. 78; Knapp v. Simon, 96 N. Y. 284.)

2. Where the person with whom the agent has dealt, after learning who was the principal, voluntarily elects to treat the agent as the party liable, he cannot then look to the principal, and must abide by his choice. He cannot hold both liable. (Paterson v. Grandasequi, 15 East, 62; Silver v. Jordan, 136 Mass. 319.)

When a party will be deemed to have elected to hold the agent liable depends upon the circumstances. Such election may be manifested by an express or unequivocal act; or be implied where the conduct of the party is such as to lead a prudent man to the conclusion that he intended to look to the agent only. Whether the conduct of the party is such as to warrant the principal in settling with the agent on the presumption that the other party has been paid, is a question of fact for the jury, with reference to the facts and circumstances of the particular case. (Schepflin v. Dessar, 20 Mo. App. 569.) But such party cannot be held to have made an election before he has knowledge of his choice in the matter, and is told of the existence of the agency and who was the principal. (Merrill v. Kenyon, 48 Conn. 314.) When the principal is discovered the party must exercise the right of choice within a reasonable time, or be deemed to have waived it. Reasonable time depending upon the circumstances. (Mechem, Agency, Sec. 700.) The rule extends to all simple contracts, whether oral or written, but not to contracts under seal, as sealed instruments bind only those who are parties to them. (Huntington v. Knox, 7 Cush. 374;

Byington v. Simpson, 134 Mass. 169; Briggs v. Partridge, 64 N. Y. 357.)

Sec. 616. SAME SUBJECT — DISCLOSED PRINCIPAL.—The fundamental principle of the law of agency being that "Qui facit per alium, facit per se," it follows that the principal is responsible for all the acts of the agent which are lawful and within the scope of the employment or character he has given the agent. We have also seen, in a previous chapter, that an agent's authority cannot be established nor enlarged by his own statements; that third persons are bound to ascertain the agent's authority; that it must emanate from the principal, though it may be express or implied; that a ratification of an unauthorized act makes the principal liable as if the act had been previously authorized; and that the performance of an illegal act by the agent, or one in which he also acts for the other party without the principal's consent, does not bind the principal.*

"The statements, representations and admissions of the agent, made in reference to the act which he is authorized to perform and while engaged in its performance, are binding upon the principal in the same manner and to the same extent as the agent's act or contract under like circumstances, and for the same reason. While keeping within the scope of his authority and engaged in its execution, he is the principal, and his statements, representations and admissions in ref-

*See Chapter III., Ante.

erence to his act are as much the principal's as the act itself."*

But the rule just stated is subject to these limitations: 1. The statement or admission of the agent in order to bind the principal, must have been made in regard to a matter within the scope of his authority; 2, and made in reference to the subject-matter of his agency; 3, and while actually engaged in the performance of a transaction, or so soon after as to be in reality a part of the transaction. (Idem.)

Another general rule helping to fix the limits of the principal's liability to third persons is, that notice to an agent, while acting within his authority, is notice to the principal. (Ross v. Houston, 25 Miss. 591; Roach v. Carr, 18 Kans. 529; Taylor v. Young, 56 Mich. 285.) So it is held that a principal is chargeable with notice of all matters concerning the subject-matter of the agency which the agent acquires while acting as agent within the scope of his authority (Backman v. Wright, 27 Vt. 187); or which he may have acquired previously, and then had in mind (Lebanon Savings Bank v. Hollenbeck, 29 Minn. 322; Chouteau v. Allen, 70 Mo. 290; Yerger v. Barz, 56 Ia. 77; contra, Houseman v. Girard Building Assoc., 81 Pa. St. 256); or which he had acquired so recently as to justify the inference that it remained fixed in his memory when the employment began. (Mechem on Agency, Sec. 721; Chouteau v.

*Mechem on Agency, Sec. 714, citing Vicksburg, Etc., R. R. v. O'Brien, 119; Linblom v. Ramsey, 75 Ill. 246, and others.

Allen, supra.) But such knowledge will not be imputed to the principal: 1. When it is the agent's duty not to disclose it, as where the knowledge is a professional secret (The Distilled Spirits, 11 Wall. 367), and, 2. When the agent's relation to the subject-matter, or his previous conduct, render it certain that he will not disclose it, as where the agent is acting for the adverse party (Innerarity v. Bank, 139 Mass. 332; Frenkel v. Hudson, 82 Ala. 158), and, 3. When the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to defraud his principal. (Mechem on Agency, Sec. 721; National Life Ins. Co. v. Minch, 53 N. Y. 144.)

When the agent's authority has terminated notice to him does not bind the principal. (Boardman v. Taylor, 66 Ga. 538.)

The rules above stated as to the principal being bound by notice to the agent, apply to corporations with particular force, as their acts and functions are performed largely through agents; and notice should be sufficient if put in process of communication through the same channel. Hence, notice to the officers and agents of a corporation, concerning matters over which they have authority, is notice sufficient to bind the corporation. (Bank v. Chase, 72 Me. 228; Wilson v. McCullough, 23 Pa. St. 440.) Stockholders are not considered agents of the corporation, and notice to them is not notice to the corporation, so an individual director is not an officer to whom notice can be given, as the directors act in a body. But notice given the board

of directors, or given to one and by him communicated to the rest when assembled, is sufficient to bind the company. (Farmers, Etc., Bank v. Payne, 25 Conn. 444; General Ins. Co. v. U. S. Ins. Co., 10 Md. 517; Union Canal v. Loyd, 4 Watts & Serg. 393.)

Sec. 617. SAME SUBJECT—FOR AGENT'S WRONGFUL ACTS.—A principal is always responsible for the wrongful acts of the agent, when such acts are committed by his express direction. (State v. Smith, 78 Me. 260.) He is liable in the same manner and to the same extent for such acts as he is for the authorized contracts of the agent; that is, as if he had performed the acts in person. (Guille v. Swan, 19 Johns. 382.)

And a principal is likewise responsible for the acts of an agent performed within the scope of his authority and employment, when such acts are negligent,* fraud-

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* "It is sufficient to make the master responsible civiliter, if the wrongful act of the servant was committed in the business of the master, and within the scope of his employment, and this, although the servant, in doing it, departed from the instructions of the master. This rule is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. * * * * * And whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim 'respondeat superior' applies, provided, only, that the agent was acting at the time for the principal and within the scope of the business entrusted to him." (Andrews, J., in Higgins v. Watervliet Co., 46 N. Y. 23.) See Noblesville, Etc., R. R. Co. v. Gause, 76 Ind. 142; Passenger R. R. Co. v. Young, 21 O. St. 518.

ulent,** and sometimes when they are willful and malicious.***

The agent also makes the principal liable for his false and fraudulent representations when they are expressly authorized, or made within the scope of the employ-

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**Armstrong v. Cooley, 5 Gilm., Ill. 512; Locke v. Stearns, 1 Metc. 560. 'The proper inquiry is, whether the act was done in the course of the agency and by virtue of the authority as agent. If it was, then the principal is responsible, whether the act was merely negligent or fraudulent." (Reynolds v. White, 13 So. Car. 5.)

*** "Where the principal owes to third persons the performance of some duty, as to do or not to do a particular act, and he commits the performance of this duty to an agent, the principal cannot escape responsibility civiliter if the agent fails to perform it, whether such failure be accidental or willful, or whether it be the result of negligence or of malice." (Mechem on Agency, Sec. 740, citing, Croaker v. Chicago, Etc., R. R. Co., 36 Wis. 657; Shea v. Sixth Ave. R. R. Co., 62 N. Y. 180.)

Professor Mechem states that while the older rule was that for willful acts, the principal was not liable unless he actually assented to them, the better and more modern rule is that the nature of the act is not the only criterion, the important test being whether the act was done in the course of the employment. While the principal is only liable for the acts of the agent committed within the scope of his authority or while acting in the course of his employment, his liability extends to acts so committed though they were the result of the agent's willful or malicious act. Thus an engineer upon a locomotive engine, who wantonly and maliciously blows the whistle so as to frighten the horses of the plaintiff, a traveler upon the highway, causing them to run away and injure the plaintiff, or who wantonly and willfully runs down and kills the plaintiff's cattle, makes his principal liable for the injury thus inflicted. (Agency, Sec. 741, citing C. B. & Q. R. R. Co. v. Dickson, 63 Ill. 151; Illinois, Etc., R. R. Co. v. Middlesworth, 46 Ill. 494; Detroit, Etc., R. R. Co. v. Barton, 61 Ind. 293.)

ment and authority, while the agent is acting as agent, and in reference to the subject-matter of the agency. (Wolfe v. Pugh, 101 Ind. 293; Eilenberger v. Protective Mut. F. Ins. Co., 89 Pa. St. 464; Jewett v. Carter, 132 Mass. 335.)

It is a general rule that the principal is not liable for the acts of an independent contractor to whom he has let the performance of an undertaking, and over whom he has no right of control. (Bennett v. Truebody, 66 Cal. 509; Wood v. Cobb, 13 Allen, 58.) The application of the rule must be made with reference to these principles: 1. That authority cannot be delegated to do an unlawful act; 2. That a person upon whom a duty is imposed, cannot shift such responsibility to a substitute. "Thus," says Professor Mechem, "if the thing to be done is in itself unlawful, or if it is per se a nuisance, or if it cannot be done without doing damage, he who causes it to be done by another, be the latter servant, agent, or independent contractor, is as much liable for injuries which may happen to third persons from the act done, as though he had done the act in person." (Agency, Sec. 747, citing, Bailey v .Troy & Boston R. R., 57 Vt. 252; Caswell v. Cross, 120 Mass. 545.)

The measure of the principal's damages for wrongful acts of the agent, when he is liable at all, is full compensation for the injury done. (Pullman Palace Car. Co. v. Reed, 75 Ill. 125.) And where the principal is personally in fault, or chargeable with gross misconduct, he may be held for punitive damages. (Cleghorn v. N. Y. Cent. R. R. Co., 56 N. Y. 44; Sullivan v. Oregon Ry. Co., 12 Oreg. 392.) This is the New York rule,

but in many cases where the principal is a corporation it is held to be liable for exemplary damages for the wrongful acts of its agents, wherever an individual would be liable, and without having previously authorized or subsequently ratified the act. (Mechem on Agency, Sec. 751; Atlantic, Etc., R. R. Co. v. Dunn, 19 O. St. 162; New Orleans R. R. Co. v. Burke, 53 Miss. 200.) The former rule is said to be the more reasonable and just. (Mechem, Agency, Sec. 751.)

Sec. 618. SAME SUBJECT—CIVIL AND CRIMINAL LIABILITY FOR AGENT'S CRIMINAL ACTS.—Though the agent's wrongful act amounts to a crime, the principal is responsible for its commission in a civil action for damages at the suit of the party injured thereby. He will also be liable where the agent has done an act in his behalf which is forbidden under a penalty, as where the agent makes an unlawful sale of whisky within the scope of the principal's employment. (George v. Gobey, 128 Mass. 289; Kreiter v. Nichols, 28 Mich. 496.) The principal's liability depends upon whether the act was committed within the scope of the employment. (Golden v. Newbrand, 52 Ia. 59.)

"But it is not only in a civil action that the principal may be made liable for the criminal or penal acts of his agents; he may be held criminally liable also under certain circumstances. Thus, the principal is unquestionably so liable, in greater or less degree, where he is present and co-operates with the agent, or encourages, aids or abets him; or where, though not present, he ex-

pressly or impliedly commands, encourages or incites the doing of the act." (Mechem on Agency, Sec. 746, citing, Bishop's Crim. Law, Sec. 649.) He is also liable for directing an act criminal in nature, or which necessitates the commission of a crime. (Idem.)

For acts committed without his knowledge or consent he cannot be held criminally liable. (People v. Parks, 49 Mich. 333; Hatheway v. Johnson, 55 N. Y. 93; Commonwealth v. Nichols, 10 Metc. 259.) But where, by statute an act, otherwise innocent, or indifferent, is forbidden under a penalty, and the penalty imposed irrespective of the question of an intent to violate such act, the principal will be liable for such penalty, though the act is done by the agent, if done within the course and scope of the employment.*

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*Mechem on Agency, Sec. 746. "Instances of these principles may be found in the case of the publication of libels; the smuggling of goods; the sale of unwholesome or adulterated food; the erection or continuances of nuisances; the transportation of forbidden goods; the transaction of business without a license and the like." (Idem.) In each of these cases the principal has been held liable criminally for the acts of the agents or servants whom he has employed. See Rex v. Walter, 3 Esp. 21; Rex v. Dixon, 4 Camp. 12.

"I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence; and there are many other cases where mere neglect may be highly criminal. Many statutes, which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public, which shall render violation impossible." (Cooley, C. J., in People v. Roby, 52 Mich. 579.)

Sec. 619. 5. DUTIES AND LIABILITIES OF THIRD PERSONS TO THE AGENT.—As a rule, the contracts made by an agent, as such, on behalf of his principal, and in which he has no beneficial interest, cannot be sued upon by the agent. The principal alone can sue upon them. (Buckbee v. Brown, 21 Wend. 110; Commercial Bank v. French, 21 Pick. 468.) But where the contract is made with the agent personally, whether intentionally or as a result of defective execution of the authority, whereby the agent binds himself instead of his principal, it is the agent's own contract and he may sue upon it. In such contracts the agent has bound himself to the other party, and in order that the contracts be valid the other party must be held bound to the agent. (Mechem on Agency, Sec. 755; Colburn v. Phillips, 13 Gray, 64; Goodman v. Walker, 30 Ala. 482.)*

Where the agent has a beneficial interest in the execution of the contract, as for advances, commission and the like, or a lien upon or special property in the sub-

* "An agent may sue in his own name: First, when the contract is in writing, and is expressly made with him, although he may have been known to act as agent. Secondly, when the agent is the only known or ostensible principal, and is, therefore, in contemplation of law the real contracting party. Thirdly, when, by the usage of trade, he is authorized to act as owner or as a principal contracting party, notwithstanding his well-known position as agent only. But this right of an agent to bring an action, in certain cases, in his own name, is subordinate to the rights of the principal, who may, unless in particular cases, where the agent has a lien or some other vested right, bring suit himself, and thus suspend or extinguish the right of the agent." (Niblack, J., in Rowe v. Rand, 111 Ind. 206.)

ject-matter of the contract, he may also sue upon it in his own name. (Chitty on Pleadings, 16 Am. Ed. 8; U. S. Tel. Co. v. Gildersleeve, 29 Md. 232.)

Although the contract is in the name of the agent and the principal undisclosed, yet the principal on whose behalf it is made may sue upon it, and thus preclude the agent, unless the contract made with the agent is under seal, or he has a beneficial interest, lien or other vested right in the matter. (Rowe v. Rand, 111 Ind. 206; Schaefer v. Henkel, 75 N. Y. 378.)

Whether an agent, who has acted as such, in dealing with a third person can show himself to be the real principal, depends upon whether the contract is executed or executory, and whether in making it he has or has not named the principal. Thus, if he contracted for a named principal and the contract is executory, or yet to be performed, he cannot, without the consent of the other party, place himself in the position of the principal for whose credit or skill the party contracted. (Rayner v. Grote, 15 M. & W. 359.) But if the contract has been executed by such agent, with the express or implied consent of the other party, he may compel performance from the other party to himself; otherwise, however, if the agent has performed as principal without the knowledge or consent of the other party. (Mechem on Agency, Sec. 760.) When the contract by the agent is made for an unnamed principal, whether it is executed or executory, the agent may show himself to be the real principal, as the other party cannot be said to have relied upon the credit or ability of

a principal whom he does not know, and the agent will answer for such unknown principal as well as another. (Schmalz v. Avery, 16 Q. B. 655.)

In all cases where the agent sues in his own name on contracts made in behalf of the principal, the defendant may avail himself of all defenses which would be good at law and in equity: 1, As against the agent who is plaintiff on the record (Evans on Agency, Sec. 387; Gibson v. Winter, 5 B. & Ad. 96.), or, 2, As against the principal for whose use the action is brought, if such a principal exists. (Grice v. Kenrick, L. R. 5 Q. B. 344.) If the action of the agent is not superseded by that of the principal, he is entitled to recover the same measure of damage as the principal himself could recover. (Groover v. Warfield, 50 Ga. 644.)

For the wrongful or tortious acts of third persons which affect him personally in the course of his employment, the agent may sue in his own name, though in cases the principal is entitled to an action for the loss of service or damage. (Weiss v. Whittemore, 28 Mich. 366.)

Ordinarily the agent's possession of his principal's goods alone does not give him the right to sue in his own name one who would disturb his possession. Otherwise, however, if the agent has a claim on the goods, or a property right in them. As against a trespasser the agent with a special interest in his principal's goods may recover the full value of the goods taken, but as

against his principal, or those claiming under him, he can only recover the amount of his interest.*

Sec. 620. 6. THE DUTIES AND LIABILITIES OF THIRD PERSONS TO THE PRINCIPAL.—The relation being created for the benefit of the principal, and the acts of the agent within his employment being in reality the acts of the principal, it follows that a principal may avail himself of, and may sue upon, all contracts made by his agent, whether his name has been disclosed or not, unless, 1, The contract is in the agent's own name and under seal (Berkeley v. Hardy, 5 B. & C. 355); 2, Where the contract is in the agent's name, is executory and involves some considerations personal to the agent (Eggleston v. Boardman, 37 Mich. 14; Boston Ice Co. v. Potter, 123 Mass. 28); 3, Where the other party to the contract, with knowledge of the real principal, has elected to deal with the agent exclusively (Winchester v. Howard, 97 Mass. 303); 4, Where the agent has a lien upon or special property in the subject-matter of the agency, exceeding or equaling its value. (Hudson v. Granger, 5 B. & Ald. 27.)

But the right of the principal to sue upon the contracts made by his agent is subject to the following limitations:

1. That defenses based upon the fraud of the agent committed within the scope of his authority, are available against the principal. (Mundorff v. Wichersham, 63 Pa. St. 87; Law v. Grant, 37 Wis. 548.)

*Mechem on Agency, Secs. 764, 765. Citing Faulkner v. Brown, 13 Wend. 63; Beyer v. Bush, 50 Ala. 19; Little v. Fossett, 34 Me. 545; Burk v. Webb, 32 Mich. 173.

2. That where the agent has been allowed to contract as principal, the real principal takes the contract subject to all defenses, whether equitable or legal, which the other party, who has had no notice of the agency, might have asserted had the agent been in fact the principal.*

Sec. 621. SAME SUBJECT—TO REPAY MONEY SECURED FROM THE AGENT.—Third persons are liable to the principal for money obtained from his agent through fraud, extortion, and the like, or which was paid them by the agent through mistake. (Sadler v. Evans, 4 Burr. 1984; Holman v. Frost, 26 S. C. 290.)

So, money belonging to the principal, in the hands of the agent, is considered as a trust; which trust can only be fulfilled by the appropriation of the fund to the object or purpose intended, unless the principal otherwise directs. If such a fund is divested from its appropriate use, a court of equity will follow it as long as it can be identified, notwithstanding it may have

*Mechem on Agency, Sec. 777. "But if the principal would avail himself of the benefits of a contract made by an agent in his own name, without disclosing his principal, he must also assume the responsibilities of the contract. He must take the contract as it exists at the time he interposes, and subject to all the rights which the other party then possesses against the agent. * * * This right (of the third person) is not affected by the fact that the agent in thus entering into the contract in his own name, without disclosing his principal, acted in contravention of the express directions of his principal." (Idem, Sec. 773. Citing Eclipse Wind Mill Co. v. Thorson, 46 Ia. 181; Peel v. Shepherd, 58 Ga. 365; Baltimore Coal Tar Co. v. Fletcher, 61 Md. 288; Amann v. Lowell, 66 Cal. 306.)

changed its form any number of times, until it comes into the possession of a holder for value, who has taken it without notice of the trust.* Nor does it make any difference that the person who receives such fund, or any portion of it, is ignorant of its nature or innocent of wrongdoing; equity will restore the fund to its proper channel, unless it meets the superior equity of a bona fide holder for value.**

Sec. 622. SAME SUBJECT—TO RESTORE OTHER PROPERTY SECURED FROM THE AGENT.—It may become necessary for third persons to restore to the principal property secured from the agent, since, as a rule, if the agent has no authority, express or implied, to transfer title, he can confer none upon third parties.***

This rule, which protects a principal from having his property sold without his consent or authority, is subject to certain limitations, founded upon the duty of acting in good faith to others so that they shall suffer no loss through his act. Thus, while it is the general rule that no person can be divested of his property

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*Taylor v. Plumer, 3 M. & S. 562; Farmer's & Mech. Bank v. King, 57 Pa. St. 202; Natl. Bank v. Ins. Co., 104 U. S. 54.

**Van Alen v. Am. National Bank, 52 N. Y. 1; Evansville Foundry Assoc. v. Riehl, 104 Ind. 70; Baker v. N. Y. National Bank, 100 N. Y. 31.

***Manning v. Keenan, 73 N. Y. 45; Loomis v. Barker, 69 Ill. 360; Bercich v. Myers, 9 Nev. 312. "The general rule is that a purchaser of property takes only such title as his seller has, and no greater or other. 'Nemo plus juris ad alium transferre potest quam ipse habet' is the maxim of the law." (Mechem on Agency, Sec. 784.)

without his consent or voluntary act,* yet, if the principal permits the agent to assume an apparent authority over his property, he will be estopped from denying that the agent had such authority when the rights of third persons have intervened and would be prejudiced by such denial.

"Two things must concur to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent: 1, The owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to, dispose of it; and, 2, The person alleging the estoppel must have acted and parted with value, upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real."**

The mere possession of the principal's goods by the agent is not, as a rule, sufficient evidence of his authority to sell the same, as the agent may have possession for many other purposes besides that of selling. (McMahon v. Sloan, 12 Pa. St. 229.)

The exceptions to this rule, as stated by Professor Mechem, are: 1. Where the property in the agent's possession consists of money or negotiable paper. 2. Where the principal entrusts the possession of his goods to one whose business it is to sell similar property as the agent of the owners. (Agency, Sec. 786.)

The first exception is said to depend upon the princi-

*Meiggs v. Meiggs, 15 Hun. 453; Barker v. Dinsmore, 72 Pa. St. 427; Saltus v. Everett, 22 Wend. 336.

**Allen, J., in Barnard v. Campbell, 55 N. Y. 456.

ples of public policy and the necessities of commerce. The second exception being based on the principles of equitable estoppel. (Burnham v. Holt, 14 N. H. 367; Pickering v. Busk, 15 East, 39.)

And where the principal permits the agent to assume the ownership of his property, with such evidences of title and authority as to lead innocent third parties, in good faith, to rely upon his title or authority to sell the same, as against the equities of such parties, he cannot deny that the agent had such authority. (Pickering v. Busk, supra; McNeil v. Tenth Natl. Bank, 46 N. Y. 325.)

The principal can recover money or property from third persons which they have secured from the agent, as a payment of a debt due them from the agent, when the agent had possession for the principal. (Thompson v. Barnum, 49 Ia. 392.) Also, if it has been taken by attachment for the agent's debts. (Loomis v. Barker, 68 Ill. 297.)

So the principal may sue upon securities which have been released by an agent acting without authority. (Whittemore v. Hamilton, 51 Conn. 153; Robinson v. Anderson, 106 Ind. 252.) And all property wrongfully sold or disposed of by the agent, as by selling to himself directly or indirectly, may be recovered by the principal, if he acts before the rights of innocent third parties have intervened. (Mechem, Agency, Sec. 791; Hughes v. Washington, 72 Ill. 84.)

Sec. 623. SAME SUBJECT—FOR TORTS.—The principal may recover against third persons for their wrongful acts in respect to the property or busi-

ness which he has entrusted to his agents the same as though he were in personal charge of the undertaking. And for fraud, negligence, trespass and the like, of third persons in dealing with his agents in connection with his interests, his rights are the same as if he had dealt in person. (Perkins v. Evans, 61 Ia. 35; White v. Dolliver, 113 Mass. 400.)

Thus, the principal has an action for the wrongful enticing away of his agent by a third person, as for inducing the agent to leave his employment. (Haskins v. Royster, 70 N. C. 601; Bixby v. Dunlap, 56 N. H. 456.) And the principal has a right of action against a third person for a personal injury to the agent, which incapacitates the agent to the damage of the principal. (Ames v. Union Ry. Co., 117 Mass. 741.)

Sec. 624. SAME SUBJECT—FOR CONSPIRING WITH THE AGENT.—A third person is not liable for a fraud committed by the agent upon the principal in the course of the transaction, unless such person becomes a party to it. When a third person does collude with the agent to defraud the principal, it voids the transaction, and the principal can recover his property unless the rights of innocent parties have intervened before he acts. And so, where the agent secretly represents the other party, he commits a fraud upon the principal, for which the principal may rescind the contract and recover the property transferred upon tendering back the consideration received. (Mechem on Agency, Sec. 798; New York Central Ins. Co. v. National Ins. Co., 14 N. Y. 85.)

CHAPTER V.

THE TERMINATION OF THE RELATION.

Sec. 625. METHODS OF TERMINATING THE RELATION.—An agency may be terminated and the authority of the agent revoked in any one of three ways: 1. By the operation and arrangement of the things, or the expiration of the time for which the agency was created. 2. By the subsequent act or agreement of the parties. 3. By operation of law.* These will be discussed in their order.

Sec. 626. 1. TERMINATION BY THE COMPLETION OF THE PURPOSE, OR EXPIRATION OF TIME SET.—When an agency is created to exist only for a stated period of time, or until the happening of some particular event, or for the purpose of performing some specific act, the expiration of the period, or the happening of the event, or the accomplishment of the purpose of the agency will terminate it. (Mechem, Agency, Secs. 200-201; Danby v. Coutts,

* "The termination of the authority may be effected by a variety of methods. Thus the agency may have been created to endure only for a limited period, and at the expiration of that period would come to a close by the mere efflux of time; or it may have been called into being for the express purpose of performing a single act or a series of acts, and these being performed, the agency would be terminated by the accomplishment of that for which it was created. Again, under such circumstances, the agency may be concluded by the act of the parties, as where the principal revokes or the agent re-

L. R. 29 Ch. Div. 500; Moore v. Stone, 40 Ia. 259; Short v. Millard, 68 Ill. 292.) And when the agency is created for the purpose of effecting some particular object, it will terminate with the accomplishment of the object, and this is so whether the object is accomplished as intended, or accomplished in some other way. Thus, where the agent is authorized to sell real estate, and before he has found a buyer, the principal effects a sale through another agent, such sale will terminate the authority given the first agent. (Ahern v. Baker, 34 Minn. 98.)

Sec. 627. 2. TERMINATION BY THE SUBSEQUENT ACT OR AGREEMENT OF THE PARTIES.—It is said that the relation of principal and agent being that of employer and employed, and founded on mutual consent, may always be terminated by the agreement of the parties. This agreement may be a condition subsequent, upon the happening of which the agency shall terminate, and termination in this way has been considered in the previous section.* We are now to consider what other acts of the parties are sufficient to terminate the agency, and under what condi-

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nounces it. So subsequent changes in the condition or relation of the parties may render the continuance of the agency inconsistent or impossible, and it will be terminated by operation of law." (Mechem on Agency, Sec. 199.)

* Anson gives the methods by which the agency may be terminated as follows: "By agreement, by change of status, or by death," putting the two methods of termination by agreement in one class and dividing the third method according to the nature of the act upon which the law operates to effect a revocation. See Anson on Contract, pp. 356-361.

tions the principal may revoke, or the agent renounce the authority.

As between the principal and agent, it is the general rule that the principal may revoke the agent's authority at any time at his own option, unless the agent's authority is coupled with an interest. (Wheeler v. Knaggs, 8 Ohio, 169; Brown v. Pforr, 38 Cal. 550; Attrill v. Patterson, 58 Md. 226.) The principal can revoke the authority without adequate reason for so doing, and though it be declared "exclusive" or "irrevocable," but for such a revocation he may be liable in damages to the agent. (Mechem on Agency, Sec. 204; Chambers v. Seay, 73 Ala. 372; Frink v. Roe, 70 Cal. 296.)*

Sec. 628. SAME SUBJECT—WHAT IS AN INTEREST?—It is laid down as a general rule that "an authority coupled with an interest is irrevocable." And the question arises, What constitutes such an interest? "Certain it is," says Professor Mechem, "that it is not any interest which will suffice. But it must be an interest or estate in the thing itself or in the property which is the subject of the power; the power and the estate must be united and co-existent, and, generally, of such a nature that the power would survive the princi-

*Public Agency an Exception to this Rule. Where the statutes of a State require that an agency be maintained within the State as a protection to the general public, such agency cannot be terminated at the will of the principal until another agent has been appointed to fill the position, unless there is no further need of the agency under the requirements. This applies to foreign insurance corporations and others, who are required to have a resident agent in the State as a prerequisite to doing business in it. (Gibson v. Mfg. Ins. Co., 144 Mass. 81.)

pal in such a way as to be capable of execution in the agent's name after the death of the principal."*

Anson states that "the cases which illustrate this rule seem to make it clear that we must not understand by such an interest as is here meant the advantage which the agent may derive from a continuance of the authority, or the inconveniences, or even the loss which he may suffer by its revocation. An authority given to an agent to pay to a third party a debt which he owes to his principal, or to sell lands and pay himself a debt due to him out of the proceeds, are instances in which an interest has been held to be coupled with the authority so as to make it irrevocable. The 'result appears to be,' said Wilde, C. J., in Smart v. Sandars, 5 C. B. 917, 'that where an agreement is entered into upon sufficient consideration, whereby an authority is given for the purpose of conferring some benefit on the donee of that authority, such an authority is irrevocable. That is what is usually meant by an authority coupled with an interest.'" (Contracts, pp. 358, 359.)

Instances of agencies held irrevocable by the principal by reason of the agent's interest therein are as follows: Authority given an agent to collect a debt due the principal, and from the proceeds to reimburse himself for moneys advanced by him to the principal. (Marizou v. Pioche, 8 Cal. 522.) Authority to the agent to sell the property of the principal and from the proceeds pay a debt due to him from the principal. (Barr v.

*Mechem on Agency, Sec. 205. Citing Hunt v. Rousmanier, 8 Wheat. 175; Blackstone v. Buttermore, 53 Pa. St. 266; Bonney v. Smith, 17 Ill. 531.

Schroeder, 32 Cal. 609.) Where the authority forms part of a contract, and is given as security in connection with the same. (Hunt v. Rousmanier, 8 Wheat. 175; Knapp v. Alvord, 10 Paige, Ch. 205). So authority given to enable an agent to reimburse himself for prior advances, or to indemnify a surety against loss, are irrevocable under this rule. (Mechem on Agency, Sec. 206; Hynson v. Noland, 14 Ark. 710.)

But, as stated by Anson, the mere interest of the agent in the result, as by way of compensation, is not enough to prevent the revocation of the agency; as where the agent's authority is to sell lands and receive a commission out of the proceeds for making the sale (Chambers v. Seay, 73 Ala. 372; Simpson v. Carson, 11 Oreg. 361) or to collect a claim and retain one-half of the amount collected, such agencies may be revoked at the will of the principal. (Flanagan v. Brown, 70 Cal. 254.)

Sec. 629. SAME SUBJECT—PRINCIPAL'S RIGHT AND POWER TO REVOKE DISTINGUISHED.—While the principal has the power to revoke any agency, at will, save those coupled with an interest, it does not follow that in every such case he has such an unqualified right to revoke as will release him from liability to the agent for so doing. The power to revoke is broader than the right to revoke without liability.

Thus if there is an agreement between the principal and his agent, that the agency shall continue for a definite period of time, or until the happening of some event, it cannot be rightfully terminated by the princi-

pal otherwise than as stipulated, unless for good cause, such as misconduct on the part of the agent. And for revocation, except for good cause, he is liable in damages to the agent as for the breach of any other contract. (Mechem on Agency, Sec. 210.)

In the absence of such special agreement, express or implied,* the bare power given an agent by the principal may be revoked at the will of the principal without incurring any liability to the agent. So if the agreement is to the effect that the agency shall continue so long as the parties are satisfied, it may be terminated without liability. (Kirk v. Hartman, 63 Pa. St. 97; Adriance v. Rutherford, 57 Mich. 170.)

Sec. 630. SAME SUBJECT—WHEN PRINCIPAL MAY RIGHTFULLY REVOKE.—The principal may rightfully revoke the agent's authority, though given for a definite time, where he proves incompetent to perform the undertaking. It is one of the implied covenants of every contract of agency that the agent shall possess sufficient skill and ability to perform the employment which he assumes, and for a failure of this covenant the principal may revoke the

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* "But a contract to retain the agent for a definite time will be implied, although not clearly expressed, where from the facts and circumstances surrounding the case such appears to have been the intention of the parties." (Mechem on Agency, Sec. 212.)

So it was held that a letter stating the wages per month which the principal would pay the employe, and, further, that "if you give me satisfaction at the end of the first year, I will increase your salary accordingly," constituted a contract for a yearly hiring. (Morton v. Cowell, 65 Md. 359.)

authority, free from liability for so doing. Otherwise if the principal has knowingly employed an incompetent person.*

So for any misconduct or misfeasance on the part of the agent connected with the principal's business, as well as for wanton violations of moral or municipal law, the principal may rightfully revoke the agent's authority before the expiration of the term.** And the principal having the right to direct the method in which the undertaking shall be conducted, disobedience on the part of the agent, and failure to obey and follow reasonable instructions will justify a revocation of authority. (Dieringer v. Meyer, 42 Wis. 311; Chicago, Etc., R. R. Co. v. Bayfield, 37 Mich. 205.)

Sec. 631. SAME SUBJECT—METHOD OF REVOKING.—The methods of revoking the agent's authority correspond with those by which the authority is conferred. Thus the revocation may be express or implied. It may be in writing, with or without seal, may be in the form of a public announcement or procla-

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*See Chapter IV., under Liability of Principal to Agent.

**"It is also an implied condition in every contract of agency that the agent will not wilfully disobey or disregard the reasonable and lawful instructions of his principal; that he will not willingly permit to suffer his principal's interests committed to his care; that he will be honest and faithful, and will exercise reasonable care and diligence in the performance of his duties, and that he will not intentionally violate the established principles of morality or the laws of the land." (Mechem on Agency, Sec. 214. Citing Case v. Jennings, 17 Tex. 661; Bixby v. Parsons, 49 Conn. 483, and others.)

mation or a private declaration. And it may be inferred or implied from circumstances.

Express revocation is not necessary, neither is revocation under seal necessary, even in those cases where the authority is required to be given under seal, though it is customary to revoke a power of attorney under seal by an instrument executed with like formality. (Mechem on Agency, Secs. 217, 218; Brookshire v. Brookshire, 8 Ired. L. 74.) But the principal's will must be expressed in some way, both to the agent and to others who have the right to know of the rescission of the authority.

Revocation is implied when the circumstances are such as to indicate clearly that the principal considers the agency terminated. Thus where the power of the agent is given to another (Copeland v. Mercantile Ins. Co., 6 Pick. 198), or the principal otherwise disposes of the subject-matter of the agency (Walker v. Denison, 86 Ill. 142), or the authority emanates from a partnership, which is subsequently dissolved. (Schlatter v. Winpenny, 75 Pa. St. 321.)

Sec. 632. SAME SUBJECT—NOTICE NECESSARY TO REVOKE.—"In order to render the revocation effectual, notice of it must be given to those parties whom the revocation is desired to affect, and these parties are the agent himself and those persons who, from the knowledge of his authority or from previous dealings with him as such, would be likely to continue to deal with him in good faith upon the strength of the previous authority."*

*Mechem on Agency, Sec. 223.

To Third Persons. A former general agent acting within the scope of his authority as originally given will, after its revocation, continue to bind his principal to persons who have dealt with him before, and who still deal with him in good faith, not having received notice of the revocation of his authority. (Lamothe v. St. Louis, Etc., Co., 17 Mo. 204; Hatch v. Coddington, 95 U. S. 48.) This results from the presumption that a general authority once shown to exist is presumed to continue until shown to be revoked. (McNeilly v. Insurance Co., 66 N. Y. 23.) Hence the principal must bring some notice of the revocation to those who have dealt with his general agent.

No such presumption arises where the agency is a special one for the transaction of a specific purpose or act, and notice is not required to be given to third persons who have dealt with such special agent, unless the revocation occurs while the agency is part executory. (Strachan v. Muxlow, 24 Wis. 21.)

To Agents. Whether the agency is general or special, notice is to be given the agent, and the revocation becomes operative as between the principal and agent upon receipt of notice by the latter. Notice sent by mail is not effective until it reaches the agent. (Robertson v. Cloud, 47 Miss. 208.) A sub-agent appointed by authority of the principal is entitled to the same notice as the agent; otherwise, if the sub-agent was appointed by the agent alone without authority from the principal. (Mechem on Agency, Sec. 227.)

The notice required to be given by the principal to agents and third persons is said to be analogous to

that required on the dissolution of a partnership, and should be coextensive with the knowledge of the authority. Notice by publication may be given to those who have had no dealings with the agent, but to those who have dealt with the agent such notice will not be sufficient unless actually received.*

Where the statutes of the States require the authority of the agent to be on record, as in the case of a power of attorney to sell real estate for the principal, and also require the revocation of such authority to be put on record, notice of the revocation can be given only by recording it or by express notice to individuals.

Sec. 633. SAME SUBJECT—RENUNCIATION BY THE AGENT.—An agent has the power to renounce the agency at will, but his right to renounce, without liability, like that of the principal, may be limited by special agreement that it shall continue for a definite period, or a specified undertaking, and his breach of this agreement without sufficient reason will make him liable in damages to the principal. But for cause he has a right to renounce at any time, though the agency was for a fixed period, and will not be liable in damages for so doing.**

The agent should give notice of renunciation to his principal, and such notice takes effect from receipt by the principal. For his own protection the principal should then give notice of the renunciation to those who have dealt with the agent and others in the same

*Mechem on Agency, Sec. 228. Citing Claflin v. Lenheim, 66 N. Y. 301; Fellows v. Hartford, Etc., Co., 38 Conn. 197.

**See Chapter IV., under Liability of Agent to Principal.

manner as if he had himself terminated the agency. (Capen v. Pacific Mut. Ins. Co., 1 Dutch, 67.)

Sec. 634. 3. TERMINATION BY OPERATION OF LAW.—The death, insanity or bankruptcy of one or both of the parties will terminate the agency. So the declaration of war between the countries of which the principal and agent are respectively citizens may terminate the agency. The agency terminates on the happening of these contingencies independent of the act of the parties, and hence is said to terminate by operation of law.

Sec. 635. SAME SUBJECT—BY DEATH OF PRINCIPAL.—In general, the death of the principal operates instantly to revoke the authority of every agent save those whose authority is coupled with an interest. The subsequent acts of the agent are invalid, though performed in good faith and without notice of the death of the principal. (Clayton v. Merrett, 52 Miss. 253; Primm v. Steward, 7 Tex. 178; Saltmarsh v. Smith, 32 Ala. 404.) But if the authority is partly executed the death does not revoke this part, and if such partly executed authority is entire in its nature it may be completed by the agent. (Mechem on Agency, Sec. 240; Garrett v. Trabue, 82 Ala. 227.) The death being classed as an act of God, the agent can have no redress for the termination of his authority in this way, though the term of his employment had not yet expired. (Yerrington v. Greene, 7 R. I. 589.)

The interest of the agent in the subject-matter of the agency, which is sufficient to prevent the agency being

terminated by the death of the principal, corresponds to that which has just been discussed under the head of revocation at the will of the principal. It must be an interest or estate in the thing itself, and not merely an interest in that which is to be produced or earned as a result of the employment. (Hunt v. Rousmanier, 8 Wheat. 174.)*

Where the principal is a partnership or other joint principal, the death of a partner or any one of the joint principals, terminates the agency unless coupled with an interest. (Mechem on Agency, Sec. 247.) And the death of the principal affects the authority of a sub-agent or substitute the same as an agent, and this whether the sub-agent has been appointed with or without the principal's authority.

Sec. 636. SAME SUBJECT—BY DEATH OF AGENT.—It is the general rule that the death of an agent revokes his authority unless it is coupled with an interest. (Adriance v. Rutherford, 57 Mich. 170; Collins v. Hopkins, 7 Ia. 463; Merrin v. Lewis, 90 Ill. 505.) A joint private agency is terminated by the death of

* "A power is simply collateral and without interest, or a naked power, when to a mere stranger authority is given to dispose of an interest in which he had not before, nor has by the instrument creating this power, any estate whatsoever; but when the power is given to a person who derives under the instrument creating the power, or otherwise, a present or future interest in the property, the subject on which the power is to act, it is then a power coupled with an interest." (Thompson, J., in McGriff v. Porter, 5 Fla. 379.) See also Berry v. Skinner, 30 Md. 567; Conners v. Holland, 113 Mass. 50; Ferris v. Irving, 28 Cal. 645; McDonald v. Black, 20 Ohio, 185; Wilson v. Edmonds, 24 N. H. 517.

one of the joint agents. Otherwise if the agency is joint and several. (Rowe v. Rand, 111 Ind. 206; Bank v. Vanderhorst, 32 N. Y. 553.) Sub-agents appointed by the agent on his own authority are discharged at his death, otherwise if appointed by authority of the principal. (Smith v. White, 5 Dana, Ky. 376.)

Sec. 637. SAME SUBJECT—BY INSANITY OF THE PRINCIPAL OR AGENT.—It is the general rule that after-occurring insanity of the principal will suspend or revoke the agency, unless coupled with such an interest in the agent as allows its exercise in the agent's name. (Davis v. Lane, 10 N. H. 156; Motley v. Head, 43 Vt. 633.) But this general rule is subject to the exception protecting innocent third parties ignorant of the principal's insanity, such persons acting in good faith without knowledge of the principal's condition will be held harmless. (Matthiesson v. McMahon, 38 N. J. L. 536; Drew v. Nunn, 4 Q. B. Div. 661.)

The insanity of the agent also terminates the agency unless his authority is coupled with an interest. But here, also, third persons dealing with the agent, in ignorance of his condition, and taking no advantage of the same, will be protected. And the insanity of one of two or more joint agents has the same effect. (Salisbury v. Brisbane, 61 N. Y. 617.) The reason for these rules lies in the fact that employment implies intelligence and ability in the agent or agents, and when these are impaired to such an extent as to endanger the proper execution of the authority, the authority necessarily terminates.

Sec. 638. SAME SUBJECT—BY BANKRUPTCY OF THE PARTIES.—When the principal becomes bankrupt, or makes a general assignment, the authority of an agent engaged in his business is thereby revoked. (Mechem on Agency, Sec. 263.) But this rule does not affect an agent whose authority is coupled with an interest; hence a power of sale conferred upon a mortgagee will not be revoked by the mortgagor's bankruptcy. (Hall v. Bliss, 118 Mass. 554.) Third persons dealing with the agent before the knowledge of the principal's bankruptcy reaches them will be protected from loss.

The bankruptcy of an agent upon whose business credit and standing the principal relies for safety, will terminate his authority. Thus, an authority to receive payment of money due the principal, or sell his merchandise, will be revoked if the agent becomes bankrupt, though authority to do a mere formal act not requiring credit would not be revoked. (Hudson v. Granger, 5 B. & Ald. 27.)

Sec. 639. SAME SUBJECT—BY WAR.—As a general rule the breaking out of war between the country of the principal and the agent, dissolves the relation between them. As war between countries puts an end to all intercourse or trading between their respective citizens. (Insurance Co. v. Davis, 94 U. S. 425; Kershaw v. Kelsey, 100 Mass. 561.)

Sec. 640. SAME SUBJECT—BY MARRIAGE.—At common law the marriage of a single woman revoked a power of attorney previously given by her, but

this rule is generally abrogated by the modern statutes giving married women capacity to contract as though single. So, the marriage of a principal may revoke authority to sell land. (Wambole v. Foote, 2 Dak. 1; Henderson v. Ford, 46 Tex. 627.)

CHAPTER VI.

SPECIAL CLASSES OF AGENTS.

Sec. 641. PURPOSE OF CHAPTER.—As stated in the opening chapter, certain classes of agents are of such general importance as to demand separate attention at the hands of text-writers; these are, Attorneys-at-Law, Auctioneers, Brokers and Factors. In the present chapter we propose to discuss the special rules applicable to these particular agencies.*

Attorneys-at-Law.

Sec. 642. NATURE OF THE RELATION OF ATTORNEY AND CLIENT.—The relation which arises from the employment of an attorney-at-law to conduct a case or transact business for one, is that of principal and agent, and the general rules applicable to agency apply to the parties to the contract. The employment of the attorney, or his authority, may be formal, but is more frequently informal, and may arise from the words or conduct of the client, or be the result of a subsequent ratification of unauthorized acts. The authority of a duly admitted attorney who appears in a

*The scope of this book will limit our consideration to a mere summary of the rules governing these agencies. For a fuller presentation of the subject the student is referred to Mechem on Agency, Book V., from which, and upon examination of the authorities therein cited, this chapter is compiled.

cause is presumed in the first instance, but the presumption is not conclusive, and may be questioned by the client or the opposite party. The presumption has its origin in the fact that the attorney is an officer of the court, and as such is considered to be acting in accordance with his duty. (Schlitz v. Meyer, 61 Wis. 418.) Hence, in an action on a foreign or domestic judgment, the defendant may show that he was not served with process and the appearance by attorney was unauthorized. (Gilman v. Gilman, 126 Mass. 26; Mastin v. Gray, 19 Kans. 458; Pennywit v. Foote, 27 Ohio St. 600; Reynolds v. Fleming, 30 Kans. 106.)

Sec. 643. SCOPE OF THE ATTORNEY'S AUTHORITY.—An attorney-at-law is defined to be "an officer of a court of justice who is qualified to conduct the cause of a litigant therein."* He is an officer of the court, and is quite generally required to have certain qualifications as a prerequisite to practicing his profession. Thus, in most States he is required by statute to pass an examination upon the various branches of law and show himself qualified by attaining a certain average grade therein. Other qualifications are, full age, good moral character, citizenship in the State, and, in some instances, it is held that only male persons can qualify as attorneys.**

Being officers of court and amenable thereto, attor-

*Mechem on Agency, Sec. 802. Citing Weeks on Attorneys, Sec. 28.

**Women are not eligible in Massachusetts. See Robinson's Case, 131 Mass. 376. But in a majority of the States women are eligible to become attorneys-at-law. (Matter of Hall, 50 Conn. 131; Matter of Goodell, 48 Wis. 693.)

neys-at-law in relation to the conduct and management of their client's suits, have a wide range of implied authority, and so long as their acts are in good faith, and are not fraudulent or collusive, they bind the client, though prejudicial to his interests. (Beck v. Bellamy, 93 N. C. 129; Boulton v. Barker, 115 Mass. 36.)

The express authority given an attorney may be as broad or limited as the client desires, but a general authority to manage a cause for the client as his attorney of record implies many incidental powers, and these are classified by Professor Mechem in his valuable work as follows:

"To make such affidavits as are required in the progress of the cause, when the facts are within his knowledge. To waive a verification. To serve, and accept service of, all necessary and proper papers, notices, etc., during the progress of the cause. To waive formal notice of proceedings in the cause. To waive or extend the time fixed for any motion or proceeding. To consent to a reference of the cause. To submit the cause to arbitrators. To dismiss or discontinue the action. To consent to a non-suit. To appeal the case. To admit facts for the purpose of trial, either on the trial or before. To stipulate as to the issues to be tried. To waive informalities and technicalities. To release an attachment lien before judgment. To stipulate that judgment in the cause be the same as in another cause then pending involving the same questions. To get necessary briefs printed at client's expense. To bring a new action after a nonsuit. To agree that upon judgment being entered for his client, he will suspend the issue of execution. To remit damages after a verdict."*

The same author has also summarized the authorities

*Agency, Sec. 812, and cases there cited.

as to what an attorney-at-law, employed to manage a suit, has not implied power to do; thus, such an attorney has no implied power:

"To admit or accept service of original process, by which the court acquires original jurisdiction for the first time of the person of his client. To confess or consent to judgment against his client. To enter a retraxit when it is a final bar. To stipulate that the dismissal of an action shall bar an action for malicious prosecution. To compromise the claim of his client. To release his client's cause of action. To stipulate not to appeal or move for a new trial. To release the property of the defendant from the lien of a judgment, or from the levy of an execution. To release his client's security without payment. To discharge or release a surety or endorser. To discharge a defendant in custody on a ca. sa., without the plaintiff's consent or without satisfaction. To agree to suspend proceedings on a judgment. To release a garnishee from the attachment of money or property in his hands. To release the interest of parties so as to make them competent as witnesses. To give an extension of time on the demand. To assign or transfer the demand or suit to a third person. To consent to stay the execution if lien will be lost. To waive the right to an inquisition. To give up the demand and take other security. To employ counsel at client's expense. To stipulate that case shall not be tried during certain periods. To undertake journeys on client's behalf and at his expense."*

An attorney-at-law may employ subordinates as clerks, stenographers, etc., to assist in the employment, but has no authority to delegate his duty to others, as the relation is pre-eminently one of trust and confi-

*Mechem on Agency, Sec. 813, and cases there cited.

dence. (Antrobus v. Sherman, 65 Ia. 230; Danley v. Crawl, 28 Ark. 95.)

Whether an attorney has implied authority to execute bonds in the name of his client depends upon the circumstances. If such bonds are required to be under seal, he must have similar authority. But where a seal is not required, and the bond is necessary to protect the client's interests and fulfill the purpose of the employment, the attorney may sign a bond in the name of the principal, but he is under no obligation to do so. (Mechem on Agency, Sec. 816; citing, Fulton v. Brown, 10 La. Ann. 250; Schoregge v. Gordon, 29 Minn. 367; Foulks v. Falls, 91 Ind. 315.)

The attorney has authority to receive payment of a claim given him to collect, but he cannot receive part in satisfaction of the whole, or grant extensions or indulgences. Payment to the attorney will discharge the debtor, but if the payment is made on account of a written security, the debtor must see that the attorney holds the security. (Smith v. Kidd, 68 N. Y. 130.) The authority extends to receive and enforce payment after judgment, and payment to the attorney of record will satisfy the judgment. (Miller v. Scot, 21 Ark. 396.) But the payment to release the judgment must be in money and for the full amount. (Herriman v. Shomon, 24 Kans. 387.)

Sec. 644. THE DUTIES AND LIABILITIES OF ATTORNEYS.—The relation between the attorney and his client is one of trust and confidence, and frequently involves affairs of the greatest importance and

delicacy, so that the rules applicable to persons standing in fiduciary relations apply with added force to this relation.

Towards his client the attorney must observe the duty to keep from accepting or representing adverse interests calculated to affect his loyalty to his principal. (Williams v. Reed, 3 Mason, 404.) So it is his duty, and one which he warrants that he will perform by accepting the employment,—to exercise reasonable care and skill in the management of the trust confided to him. He is not held to the highest degree of skill or ability, and is not to be presumed infallible, nor bound to know all the law. (Montriou v. Jefferys, 2 C. & P. 113.) And if he possesses the average degree of skill and learning in his profession current in that part of the country in which he practices, and exercises such learning and skill with reasonable care and diligence, he will not be liable for mistakes made in the course of the employment. (Mechem on Agency, Secs. 824-5, citing Cooley on Torts, p. 649.)

For negligence in respect to his duty to exercise reasonable skill and care, he is liable in damages to his client. And for negligence or palpable ignorance in regard to the well-known and well-settled principles of law which affect the client's rights, whether as respect the bringing of a suit, the conduct of the trial, examination of title, preparation of contracts, and the like, the attorney becomes liable to his client for the injury done. (Mechem on Agency, Secs. 827-830.) The measure of damage being the actual loss sustained as the natural, direct and proximate result of his negli-

gence or ignorance. (Pennington v. Yell, 11 Ark. 212; Stevens v. Walker, 55 Ill. 151.)

Towards third persons the attorney cannot become liable for the neglect of any duty he owes to his client. But he may not collude with his client to perpetrate a fraud upon a third person, and for such wrong doing he is liable. (Savings Bank v. Ward, 100 U. S. 195.) He is held liable as other agents where he contracts in his own name. (Idem.) Thus, he is held liable for the fees of court officers for serving and filing writs and papers in an action. (Mechem on Agency, Sec. 838; citing Heath v. Bates, 49 Conn. 342, and other cases.)

For his torts or wrongs towards third persons in his individual capacity he is liable, but for acts done in pursuance of his profession at the instance of the client, in good faith and without malice, he is not personally responsible, and this is true though the client has acted with malice or without probable cause. (Burnap v. Marsh, 13 Ill. 535; Peck v. Chouteau, 91 Mo. 140.) The attorney is liable if of his own malice, though apparently acting for the client, he begins or carries on a malicious prosecution. (Stockley v. Hornidge, 8 Car. & P. 16.) So, if the attorney, knowing that his client was acting maliciously and without probable cause, assists him in the issuing and service of process, he will be liable personally as well as the client. (Burnap v. Marsh, supra.)

Sec. 645. LIABILITY OF THE CLIENT TO THE ATTORNEY.—The attorney, as other agents, is entitled to reimbursement for costs, charges, and expenses which he has incurred in his client's behalf, and

to be indemnified from the result of acts done for the client within the scope of his authority. (Clark v. Randall, 9 Wis. 135.) He is entitled to compensation, and may sue for same. (Stanton v. Embrey, 93 U. S. 548.) The compensation may be agreed upon and then the special contract governs; but in the absence of express contract the attorney is entitled to compensation measured according to the reasonable value of the services performed. And the question of what is a reasonable value is determined from a consideration of "the nature of the controversy and the questions involved; the amount at issue; the skill and labor required; the responsibility imposed; the standing, experience, learning, reputation, tact, assiduity and integrity of the attorney; and the success achieved." (Mechem on Agency, Sec. 849, citing, Eggleston v. Boardman, 37 Mich; Bruce v. Dickey, 116 Ill. 527.)

It is the right of the client to discharge the attorney at any time, and this though there has been a general retainer for which the attorney is bound to conduct the case from its beginning to its termination. (Tenney v. Berger, 93 N. Y. 524.) The client may by a special agreement bind himself to pay and employ the attorney for a definite period, or for a certain case. In the absence of such agreement the dismissal of the attorney is no grounds for damages from the client. But it is held that the attorney cannot be discharged without cause until he is paid his fees and charges. (Ogden v. Devlin, 45 N. Y. Supr. 631.)

Sec. 646. THE ATTORNEY'S LIEN.—The right of an attorney to a lien on the property or papers of his

client for services, costs, and the like, may be: 1. A general or retaining lien; and, 2. A particular or charging lien. A general or retaining lien is given an attorney by the common law, and consists in the right to retain the property, money and papers of a client until the costs and charges are satisfied by the client. It depends upon possession, and cannot be enforced by sale in the absence of a statute permitting it. (Mechem on Agency, Secs. 859-860.) See Iowa Code, Sec. 215; Dak. Code, Kansas Comp. L. Secs. 468-9.

The general or retaining lien gives the right to retain money, property, or papers of the client which have come into the attorney's possession. But for the lien to attach, the property or papers must have come into his possession while acting for the client and in his professional capacity. (Hooper v. Welch, 43 Vt. 171.) Formerly the lien was claimed to cover only the costs and charges of the particular case, but now as a rule it is held to cover and secure a general balance due the attorney for services and charges for the client in whatever cause. (McDonald v. Napier, 14 Ga. 89; Cooke v. Thresher, 51 Conn. 105; Hurlbert v. Brigham, 56 Vt. 368.) The lien prevails against attaching creditors, and cannot be lost by the assignment or bankruptcy of the client. (Weed v. Boutelle, 56 Vt. 570; Ward v. Craig, 87 N. Y. 550.)

The Special or charging lien did not exist at the common law,* but has resulted from rules of the courts seeking to protect the attorney for expenses incurred

*Mechem on Agency, Sec. 868. Citing, In re Wilson, 12 Fed. Rep. 235; Barker v. St. Quentin, 12 Mees. & Wels. 441.

for the benefit of the client. It consists of the right to charge and enforce upon a judgment secured for the client the expenses, charges and services of the attorney by whose aid it was secured. Possession is not necessary or possible in this case, and the right extends to enable the client to get payment direct from the judgment, either upon motion of the court, out of the funds realized, or by following his remedy as an equitable assignee of the judgment, which he is considered as being. (Stratton v. Hussey, 62 Me. 283; Walker v. Floyd, 30 Ga. 237.)

The charging lien extends to protect only the costs and expenses incurred in obtaining the judgment, and does not cover a general balance due the attorney for services or charges in other cases. (Mechem on Agency, Sec. 870; in re Wilson, supra; Weed v. Boutelle, supra, Jackson v. Clopton, 66 Ala. 29.)

The special charging lien exists by statute, or is enforced by the courts, in a majority of the States. The statutes are not uniform in their provisions, and must be referred to. In some States a lien on the judgment does not exist. (Diehl v. Friester, 37 Ohio St. 473; Lewis v. Kinealy, 2 Mo. App. 33.) In the absence of statute giving it earlier effect, the charging lien does not attach until the judgment has been rendered, and a previous settlement between the parties would bar the attorney's right to a lien. (Mechem on Agency, Sec. 871; Coughlin v. N. Y. C. R. R., 71 N. Y. 443.) This lien is upon the judgment alone, unless the statute enlarges it, and does not attach to other property of the client gained in the suit. (McCullough v. Flournoy,

69 Ala. 189.) The lien depends upon the law of the State where the judgment is rendered, and not of the State where it may be attempted to be collected, and by comity the courts of one State protect and enforce the lien given by the laws of another State. (Citizens' Natl. Bank v. Culver, 54 N. H. 327.)

Sec. 647. PRIVILEGED COMMUNICATIONS. —One of the well-settled rules of law is that which makes confidential, and protects from disclosure the secret communications and disclosures which are made necessary in certain cases between a person and his adviser. The law seeks to protect the confidence the client reposes in the attorney by protecting him from being compelled to disclose these matters, and further prevents him from voluntarily disclosing them without his client's permission. (Greenleaf on Ev., Secs. 237-246.) This subject of privileged communications pertains rather to the law of evidence than to the subject now in hand, and the student is referred to the subject of evidence in a later number of this Series.

II Auctioneers.

Sec. 648. IN GENERAL OF AUCTIONEERS.— As a rule, in the absence of statute prescribing requirements, any person competent to act as an agent may be employed as an auctioneer. Regulations in some cases are prescribed by statute, and they may also be subject to local municipal regulations. The auctioneer is the agent of the person employing him to sell up to the moment he accepts a bid and declares the sale consummated. He then becomes the agent of the purchaser

to complete the transfer and sale of the property and may bind him by making and signing memorandums of the transaction. In making the terms he acts for both parties with their implied assent. But his authority to bind the purchaser is limited and must be exercised at the time of accepting the bid and at the place of sale. (Horton v. McCarty, 53 Me. 394.) His authority may be by parol or in writing, and need not be in writing even to sell realty, unless expressly required by the statutes. (Doty v. Wilder, 15 Ill. 407.) The authority to sell goods at auction may be implied, but does not arise from a mere authority to sell. The auctioneer has implied power to arrange the conditions and terms of sale upon such reasonable and ordinary rules as usually govern, but these may be prescribed by the owner and then must be followed, and the buyer who has notice of them cannot acquire title contrary to their provisions. (Farr v. John, 23 Ia. 286; Powell v. Edmunds, 12 East, 7.) Further, the auctioneer has implied power to accept the highest bid and declare the sale consummated; to receive payment in cash at the time of sale of the purchase price, unless known to be restricted in this respect, and in the case of personal property to sue for the price or the recovery of the goods, if the terms of the sale are not lived up to by the purchaser. (Bateman on Auctions, Secs. 122-4; Thompson v. Kelley, 101 Mass. 291; Broughton v. Silloway, 114 Mass. 71.)

The auctioneer has no authority to delegate his employment; to sell on credit; to revoke the sale when completed; to sell at private sale; to bid himself directly

or indirectly, or to warrant quality, unless such is the usual custom. (Mechem on Agency, Secs. 899-904.)

Sec. 649. DUTIES AND LIABILITIES OF AUCTIONEERS.—As other agents he is bound to exercise such skill and diligence as the employment which he holds himself out as competent to conduct requires, but will not be responsible for mistakes or errors of judgment in the absence of apparent negligence. He should obey and follow the reasonable instructions of the principal, look after the safety of goods entrusted to him, account for proceeds, attend to his duties in person, and disclose the fact of his agency and the name of his principal.*

For failure to disclose his principal he makes himself personally liable to the persons with whom he deals. (Mills v. Hunt, 20 Wend. 431.) And by exceeding his authority to represent and bind the principal he makes himself personally responsible, as by warranty of his principal's title. (Dent v. McGrath, 3 Bush, 174.) He is held to be responsible to the true owner for selling goods given him for sale by one having no title, as a thief. (Morris v. Hall, 41 Ala. 511.) But is not liable for failing to sell property as advertised, though parties have been put to expense to attend the sale. (Harris v. Nickerson, L. R. 8 Q. B. 286.)

Sec. 650. RIGHTS OF AUCTIONEERS.—From his principal the auctioneer is entitled to be indemnified

*Hicks v. Minturn, 19 Wend. 550; Steele v. Ellmaker, 11 Serg & Rawle, 86; Schoenfeld v. Fleisher, 73 Ill. 404.

for all authoritative acts within the scope of the employment, to be compensated for his services as agreed or at the statutory rate, and for costs and expenses. He is given a lien on the goods of the principal or upon the proceeds of the sale for his charges and compensation. (Mechem on Agency, Secs. 917-919.)

The auctioneer, as against a wrongdoer, is regarded as having a special property in the goods entrusted to him, and may recover for any injury done them, but he cannot dispute the title of his principal to the goods.

III Brokers.

Sec. 651. KINDS OF BROKERS.—The occupation of a broker is to bring parties together for the purpose of bargaining, or to make bargains for them in various commercial matters. They may be divided according to the class of transactions in which they deal, into money-brokers, stock-brokers, ship-brokers, bill-brokers, insurance brokers, real estate brokers, and merchandise brokers. (Mechem on Agency, Sec. 928.)

A bill and note broker negotiates the sale and exchange of promissory notes and bills of exchange. An change broker negotiates the transfer of foreign or domestic bills of exchange. An insurance broker negotiates deals between parties seeking insurance and the insurance company, usually representing the insured and not the company. A merchandise broker negotiates sales of merchandise between parties, but does not take possession or control of the property sold as do factors. (Bouvier's Law Dict. "Brokers.")

A stock broker, Bouvier defines as one "employed to buy and sell shares of stock in incorporated com-

panies and the indebtedness of government." In buying and selling stocks and securities he is a mere agent of the principal, but stock brokers are now customarily employed to not only act as agent for the principal, but upon his authority to buy stocks on their own credit or with their own funds, as a matter of speculation, for which they charge a stated commission. This is the method followed by stock-exchange brokers.*

Sec. 652. THEIR APPOINTMENT AND IMPLIED POWERS.—In the absence of statute no special mode of appointing or authorizing a broker is necessary, and the authority may be given by parol or in writing, or may be implied from acts and conduct of the parties. (Howe Machine Co. v. Clark, 15 Kans. 493.) The implied powers of the broker duly authorized are not extensive, not having possession of the goods or property, his duties are rather to assist the parties to act for themselves than to represent them. The usages which have grown up in the particular transactions which he makes, assist in determining and fixing the limits of his implied powers. These commercial usages are enforced by the courts when reasonable. (Mechem on Agency, Sec. 940.) The principal is supposed to give the authority with reference to well-known usages of the business, but usage will not suffice to authorize a broker to act contrary to express instructions. All reasonable and necessary powers to conclude the transaction for which he was engaged are implied.

*Mechem on Agency, Sec. 936. See Markham v. Jaudon, 41 N. Y. 256.

He has no authority to delegate his employment, or to act for any but the party employing him, unless with the knowledge and consent of both parties whom he seeks to represent; or to go outside of his instructions, unless in cases of emergency. He should act only in the name of the principal, and as a rule has no implied power to act in his own name. (Saladin v. Mitchell, 45 Ill. 79.) If employed to buy or sell property and not instructed as to price, he has implied authority to pay or receive in good faith the usual market price. (Bigelow v. Walker, 24 Vt. 149.) He has no authority to receive payment unless expressly conferred, but having the right to arrange the terms of sale may give reasonable credit, unless usage forbids.

Sec. 653. DUTIES AND LIABILITIES OF BROKERS.—He is held to the usual and ordinary skill and diligence which is employed by others in the line of his employment, and for a failure to exercise such reasonable and usual discretion and diligence he will be liable to his principal for the loss suffered by him. He is required as all agents to be loyal to his principal, and this forbids him buying from or selling to himself without the knowledge and consent of the principal. He cannot, for the same reason, act for both parties without the full knowledge and warrant of each. (Alexander v. Northwestern University, 57 Ind. 466.)

By concealing his agency and the name of his principal he makes himself liable upon the contract. So he may expressly charge himself by buying on his own credit, but to do so when the principal is known the facts must be clear. He becomes personally liable when

he assumes to act for a principal and lacks the requisite authority to bind the principal.

Sec. 654. THE BROKER'S RIGHTS.—From the principal the broker is entitled to compensation, and this is usually a commission or percentage on the value of the undertaking or employment. This rate or commission may be established by a custom or usage when not expressly fixed. To be entitled to compensation, the broker must prove his employment, and further that it has been performed according to the terms. (Mechem on Agency, Secs. 962-6.) The principal's right to sell real estate himself continues after the employment of a broker for the same purpose, unless he has expressly waived the right, and for a sale by the principal the broker can claim no commission unless the sale was the results of his own efforts. (Hungerford v. Hicks, 39 Conn. 259; Keys v. Johnson, 68 Pa. St. 42.) But the principal cannot cut off the broker's right to compensation by revoking his authority before the time set for its termination, and for so doing he is liable to the agent in damages. The principal may employ two or more brokers unless he has given one an exclusive authority to sell.

For all costs and expenses incurred by the broker, and for all losses and liabilities incurred in good faith in the line of his authority, the principal must indemnify him. In case the undertaking is entire and is not completed by the broker, his right to reimbursement and indemnity depends upon the same principles which govern his right to compensation. If his employment did not contemplate payment unless the sale was consum-

mated, he cannot, in the absence of special agreement, recover for expenses incurred.

The broker has no general lien, not having possession of property, but in cases they have a particular lien. Thus, an insurance broker may have possession of the insurance policies negotiated by him, and has a retaining lien for his costs and charges in securing them. (Barry v. Boninger, 46 Md. 59.)

As against third persons the broker has no special property to protect and is only called upon to sue personally in case he has contracted in his own name, or is the real principal, or has a special interest in the subject-matter of the contract. (Mechem on Agency, Sec. 983.)

IV Factors.

Sec. 655. APPOINTMENT AND IMPLIED POWERS OF FACTORS.—Factors are persons employed to sell goods upon commission. Their appointment may be by parol, in writing, or inferred from conduct. No formal grant of authority being necessary. Their powers may be expressly limited, and unless limited they include by implication not only those necessary and usual to complete the purpose of the employment, but also those customary powers established by well-known commercial usages. (Owings v. Hull, 9 Peters, 607.)

Factors have implied power to sell on credit unless limited in this regard by special instructions or usage, but must exercise a reasonable discretion as to whom to trust. (Pinkham v. Crocker, 77 Me. 563.) Also to sell in his own name, to warrant quality, and receive pay-

ment. (Mechem on Agency, Secs. 991-3.) He may pledge the goods in his possession for charges or duties levied upon them, but cannot pledge them for his own personal debt. (Wright v. Solomon, 19 Cal. 64.) Where the factor pledges without authority, as for his own debt, the pledgee takes no title as against the owner, unless, as is the case in several States, the statutes, or Factors' Acts, protect those who have dealt in good faith with the factor, believing that he was the owner of the goods entrusted to him. See Revised Statutes of Ohio, Sec. 3216.

Sec. 656. DUTIES AND LIABILITIES OF FACTORS.—Factors also are bound to that degree of skill, diligence and prudence which is current in the employment they profess to follow. They are bound to be faithful and loyal to their principal, and keep themselves from assuming adverse interests or from representing the other party to the transaction. It is their duty to obey reasonable instructions from the principal, and to safeguard his interests. They should inform the principal of facts coming to their knowledge in relation to their agency and material to the principal's interests. For failure to perform these duties they are liable to the principal for the loss suffered by him.

Sec. 657. RIGHTS OF FACTORS.—A factor is entitled to compensation from the principal, usually a commission fixed by agreement, by usage, or upon a quantum meruit. (Mechem on Agency, Sec. 1027; Zurn v. Noedle, 113 Pa. St. 336.) For all advances, and expenses incurred on the principal's behalf within the performance of the undertaking, the factor is enti-

tled to be reimbursed by the principal. And for all acts within the limits of his authority and liabilities incurred in the discharge of his duties he is to be held harmless by the principal. He is given a general lien upon all goods of the principal of which he has the possession, and upon the money or security realized from their authorized sale, to secure the payment of all amounts due him by the principal in reference to the particular goods, or any general balance due under the contract of agency. But the lien does not extend to protect a debt contracted prior to, and without reference to the agency. (Story on Agency, Sec. 376; Jordan v. James, 5 Ohio, 88.)

As against third persons, the factor can sue for the purchase price of the goods, or upon a note taken in payment from the purchaser. He also may sue upon the contract if made in his own name, and maintain an action for trespass, trover, or replevin against those who injure the goods or seek to take them without authority. (Beyer v. Bush, 50 Ala. 19.)

THE LAW OF BAILMENTS.

CHAPTER I.

Sec. 658. BAILMENT DEFINED.—Bailment is treated under the head of contracts by Blackstone, and is defined to be "a delivery of goods in trust, upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee." The word itself being derived from the French "bailler," signifying to deliver.*

The contract of bailment is usually an implied contract, the parties though free to make express stipulations in regard thereto, more frequently leave it for the law to deduce a contract from the nature and necessity of the transaction. Hence the law of bailments is chiefly the law of implied contracts.

The person making the delivery, or who parts with his goods, is called the bailor, and the person receiving them is called the bailee. The bailee, as we shall see, may also be designated by various other names, as car-

* 2 Bl. Com. 451.

"A bailment is where personal property is delivered by one person to another to keep, to use, to improve or to repair, and to return when the purpose is accomplished, or to sell or transport and deliver to a third person." (Browne on Bailments. Redfield, Carriers & Bailments, Sec. 617.)

rier, innkeeper, factor, and the like, corresponding to the particular relation which he assumes toward the goods.

A bailment contract is said to arise whenever one person has his property or goods in the hands of another; thus, if a person hire a horse at a livery stable he becomes the bailee of the horse; so, where goods are given to another to be transported or to have anything done to them, the receiver of the goods becomes a bailee of them. These illustrations suffice to show the importance of the law of bailments, as bailment contracts enter into the daily transactions of almost every person, and lie at the foundation of the system of transportation, whether by steam or horse power, on land or at sea.

Sec. 659. THE HISTORY OF BAILMENTS.—Bailments were of little importance in the early history of the common law, as real estate was then the only important kind of property, personalty being of little significance. Over ninety per centum of the cases which came before the early English courts related to realty. With the progress of civilization, invention and machinery, personal property has become more and more important, until to-day, personalty, and contracts relating thereto, have become the leading concern of the courts.

The corner stone and leading case in bailment law is that of Coggs v. Bernard, 2 Lord Raymond, 909, decided by the English court in 1703. The decision in this case is practically an essay on the subject of bailments. The question which came before the court was whether the defendant, who had undertaken to remove

several casks of wine from one cellar to another without compensation for the work, was liable to the plaintiff for doing the work so carelessly that one of the casks was broken and the contents lost. The court found the defendant liable for the damages, and laid down the principle which has ever since governed in bailment law: that where one undertakes to perform a service upon goods, though without compensation, he is liable for doing the work so negligently that injury results. That is, as stated, "If a man undertakes to carry goods safely and securely he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier and was not to have anything for the carriage." (Idem.)

Sec. 660. BAILMENT NOT AN EQUITABLE TRUST.—A bailment is a trust in one sense, but it is to be distinguished from the technical trust enforced by courts of equity. In an equitable trust there is a passing of the legal title from the grantor to a trustee to hold in trust for another who is termed the "cestui que trust." In a bailment contract the legal title always remains in the bailor. (Hodges v. Hurd, 47 Ill. 363.)

Sec. 661. A BAILMENT DISTINGUISHED FROM A SALE.—A bailment is not to be confounded with a sale, though in some instances a sale may resemble a bailment. A sale signifies the absolute transfer of property from one person to another. A bailment is only a qualified transfer; the bailor retains the title to the property and gives to the bailee the mere possession of it. This distinction is seemingly an easy one to

make, and yet the courts are often in conflict in deciding whether a particular transaction constitutes a sale or a mere bailment. The trouble arises from the uncertainty as to the real intention of the parties, whether they intended that the title should pass or only the possession.*

Thus, if a person receives goods upon an agreement that he may purchase upon certain conditions, as that the goods shall prove satisfactory, he holds the goods as bailee until the condition is fulfilled, and the sale is complete.** But if one purchases goods outright with the option of returning them at a certain time, he is the owner and not a bailee of the goods, and would be the loser if they should be lost or destroyed while in his

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*Enlow v. Klein, 79 Pa. St. 488; Rice v. Nixon, 97 Ind. 97. In the first case one party agreed to furnish the other with a team of horses and other articles for the purpose of peddling, upon weekly payments of $5 for a period of 200 payments, the team to belong to the first party until the end of the payments, the other party agreeing to keep up repairs and to replace a horse, should one die. This agreement was held a bailment of the property and not a sale.

In the second case, where grain was left with a warehouseman to be stored for the owner, and was placed in a bin with the grain of other parties, the warehouseman selling from the bin, but keeping enough on hand to supply the owners of stored wheat, the contract was held a bailment and not a sale.

**But by modern decisions sales of personal property on the installment plan, under terms indicating that the contract is rather a lease than a sale or bailment, as where payments are designated as "rent," and the title to remain in the lessor until a certain amount is paid and then vest in the lessee, are uniformly treated as sales and neither as leases or bailments. (Browne on Bailments, 5, citing Loomis v. Bragg, 288; Singer Co. v. Cole, 4 Lea, 439.)

possession. So, a person who took a horse in the morning, under agreed terms of sale, subject to trial and return in the evening if it was not suitable, was held to be a bailee of the horse and not liable for an injury to the same occurring without neglect on his part. (Hunt v. Wyman, 100 Mass. 198.)

Where a person receives a chattel for a specified time and agrees to pay for its use, and, further, to purchase it during or at the expiration of such period, the contract is one of bailment and not of sale. (Dando v. Foulds, 105 Pa. St. 74; Enlow v. Klein, supra.) So, a contract to furnish materials to which the other party is to add materials and manufacture the whole into an article or commodity, is a contract of bailment and not of sale.*

Sec. 662. METHOD OF TREATING THE SUBJECT.—We propose after having introduced the subject in the present chapter, to next consider the general principles applicable alike to all bailments, then to clas-

*Wetherell v. O'Brien, 140 Ill. 146. "If the identical thing delivered is to be returned, even in an altered form, it is a bailment; but if the receiver is at liberty to return another thing, either in the same or a different form, or to pay money, at his option, it is a sale, title passes, and the property is at the risk of the receiver. So where grain is delivered to be returned as meal, lumber as boards, leather as shoes, or wool as cloth, it is a bailment and not a sale. (Woodward v. Semans, 125 Ind. 330; Foster v. Pettibone, 7 N. Y. 433.) But if by contract or usage the identical thing is not to be returned, but only its equivalent, either in the same form or some other, or paid in money, at the receiver's option, it is a sale or exchange, title passes on delivery, and the risk is upon the receiver." (Browne on Bailments, 3, citing Sturm v. Baker, 150 U. S. 312; Mack v. Snell, 140 N. Y. 193.)

sify bailments discussing briefly the various divisions usually made, and finally to consider the classes of exceptional bailees, whose rights and liabilities are modified on various grounds, including Common Carriers, Innkeepers, Express and Telegraph Companies.

Sec. 663. WRITERS ON BAILMENT LAW.—One of the earliest authorities on this subject was Sir William Jones' Essay on Bailments. The American authorities are: Story, Schouler, Edwards, Lawson, Browne and Hale.

CHAPTER II.

GENERAL PRINCIPLES AND CLASSIFICATIONS.

Sec. 644. WHO MAY MAKE A BAILMENT OR BECOME A BAILEE.—We have seen that a contract, express or implied, is the basis of every bailment, and it necessarily follows that persons who are unable by reason of some legal disability or incapacity to make a valid contract, may be unable to make a bailment of property or to become liable on the contract as bailees, as infants, insane persons, and, formerly, married women.

But it is also to be borne in mind that in bailments there are certain duties imposed by law which are independent of contract, and these duties must be performed though the person is incompetent to contract, and for failure to do so he becomes liable in tort for the wrong or negligence from which injury has resulted to the other party, though he could not be bound for a breach of contract.

Sec. 665. WHEN BAILEE BECOMES LIABLE FOR A CONVERSION.—When a bailee departs from the agreement under which he has possession of the bailed property, he becomes liable as for a conversion. The bailor may waive the tort or wrong in such cases and sue for damages for the negligent use on the

part of the bailee. But, as indicated in the last section, where the party is an infant, and not bound by his contracts, it would be necessary to sue for the conversion of the goods, that is, in tort.*

Sec. 666. THE SUBJECT-MATTER OF BAILMENTS IS PERSONALTY.—The contract of bailment is always in regard to personal property. In the early English law it referred to corporeal or tangible property only. But the law now allows the delivery in bailment of all kinds of personalty, whether visible and tangible, as horses, goods, etc., or incorporeal chattels, as notes, stocks, bonds and judgments. (Schouler on Bailments, Sec. 168.) So, a chattel mortgage upon a stock of merchandise, and even book accounts, may be

*Where an infant hired a horse to go to A, and then drove the horse to B, and while at B the horse was injured without his fault, the court held that the moment the infant departed from the course agreed on, he was liable in trover or for a conversion though he was an infant. (3 Pick., Mass., 492; Woodman v. Hubbard, 25 N. H. 67.) But later cases incline to hold that the mere use of property beyond the agreed limits does not work a conversion unless the injury occurred as a result of the excessive use. And the Iowa Supreme Court held that driving a horse beyond the specified limit did not amount to a conversion. (Doolittle v. Shaw, 60 N. W. R. 621, 26 L. R. A. 366.) See Browne on Bailments, 40 and note. In the Iowa case the court said: "To constitute a conversion, in a case like that at bar, there must be some exercise of dominion over the thing hired, in repudiation of, or inconsistent with, the owner's rights. We hold that the mere act of deviating from the line of travel which the hiring covered, or going on beyond the point for which the horse was hired, are acts which, in and of themselves, do not necessarily imply an assertion of title or right of dominion over the property inconsistent with, or in defiance of, the bailor's interest therein."

placed in bailment, and such bailments have been sustained by the courts.*

But it is held that there cannot be a technical bailment of property not yet in existence, as brick to be manufactured, but there may be a valid pledge of such property, so that when it does come into existence the rights of the pledgee will attach. But to constitute a bailment there must be property which can be delivered.

Sec. 667. THE DELIVERY MAY BE ACTUAL OR CONSTRUCTIVE.—The bailment arises on the delivery of the property to the bailee, the delivery signifying a mere transfer of the possession of the article and not a change of ownership or title. To constitute a bailment there must be a change of possession. (Schouler on Bailments, Sec. 39.) The delivery may be an actual delivery at the time of the bailment, as where a horse is transferred from the possession of the bailor to that of the bailee, or it may be constructive, as where the article is already in the possession of the bailee for some other purpose, and there is a mere assent that it shall from that time be held in bailment. But this change in the character of the holding must take place, one cannot retain possession as owner, and still be regarded in law as holding in pledge for another. See Story on Bailments, Sec. 55.

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*Wells v. Archer, 10 S. & R. 412; Dewey v. Bowman, 8 Cal. 145; Jerome v. Carter, 94 U. S. 734; Strong v. National Bank, 45 N. Y. 718.

Moffat v. Van Doren, 4 Bosw. 609, holds that a pension certificate cannot be pledged.

Sec. 668. WHO MAY DELIVER.—Any person having property in his possession may place it in bailment. So an agent or servant of the bailor may make a sufficient delivery of the property to the agent or servant of the bailee.

Sec. 669. WHEN THE BAILEE IS BOUND BY THE BAILMENT.—A person is not to be bound as a bailee of property which has come into his possession until he has notice of such possession; and there can be no bailment until there is something to show bailment knowledge and intent to assume the possession of the goods. That is, the bailee is not bound until he has accepted.

But the acceptance by the bailee may be express or implied; thus the intention on the part of the bailee to accept the charge of the property in bailment may be by his express and open assent, or it may be inferred from his knowingly assuming the possession and control of the property, technically called constructive acceptance. Thus, where property comes into one's possession without his knowledge, as where goods are placed in a person's wagon by mistake, such person is in no sense a bailee until he learns of the possession; upon learning of his possession of the goods, public policy imposes upon him the obligation to use good faith in preserving them, and he is made a constructive bailee. The bailment which thus arises is sometimes called a "quasi bailment," public policy imposing upon the quasi bailee the duty to deal with such property in good faith, and makes him liable for bad faith or gross neglect thereto; other examples of quasi bailees are,

finders of lost goods, and revenue or court officers who have property belonging to others left in their hands.*

Sec. 670. A TRESPASSER NOT A BAILEE.—It is a general rule that where one comes into possession of property of another by reason of a trespass, or wrongful act, he cannot claim to be a bailee of the property. If such person were allowed the rights of a bailee he would only be held for the exercise of due care in regard to the property, and not be responsible for injuries to it which occurred without his fault. But a trespasser or wrongdoer is made an insurer of the property which he has secured, and is held responsible for any injury to it, regardless of the question of negligence. So, where one person takes the horse of another as a trespasser, and while in his possession the horse is killed by a third party, without fault of the trespasser, he is yet held responsible for the loss of the horse.

Sec. 671. THE BAILMENT CONTRACT.—The bailment contract may be express or implied. When the contract is express its terms govern, subject to certain restrictions which the law imposes upon special bailees, restraining them from contracting against the consequences of their own negligence, a subject to be discussed later on.

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*A quasi bailment may arise by delivery actual or constructive. In the case of lost goods, the finder is in one sense the bailee. The law imposes upon him an obligation resembling that of a gratuitous depositor. He is liable if the goods are again lost or injured through his bad faith or gross negligence. (Story on Bailments, Sec. 85; Rodgers v. Stophel, 32 Pa. St. 111.)

Where there is no contract between the parties the law steps in and makes a contract to govern the situation in which they have placed themselves. Thus, the law imposes upon the bailee the implied obligation to execute the bailment purpose with care and skill. Just what degree of care and skill will be required of any particular bailee will be considered hereafter; generally speaking, it depends upon the nature of the bailment, and the degree of skill which the occupation of the bailee requires of him.

Sec. 672. SAME SUBJECT—THE CONSIDERATION.—All binding contracts must have a consideration. In a bailment contract the consideration is the reward received or to be received. But in some kinds of bailments there is no reward given or offered; these are called gratuitous bailments. In these the inconvenience or detriment to the bailor in parting with his property, is the consideration for the express or implied promise of the bailee to use due care and skill in dealing with it.

Sec. 673. TITLE TO THE BAILED PROPERTY.—The legal title to the bailed property remains in the bailor, and he may transfer his right to the property bailed without the consent of the bailee.

And in suits regarding the bailed property, however they may arise, the bailee is estopped from denying or disputing the bailor's title to the goods at the time they were delivered to him. The reason of this rule is plain, as it was from the bailor that the bailee received the goods he is not allowed to dispute the right of him under whom he claims. But a bailee may show that

the bailor has transferred his title since making the bailment, or that the goods were taken from him by legal process at the instance of the real owner. (Rogers v. Weir, 34 N. Y. 463; Burton v. Wilkinson, 18 Vt. 186.)

The natural increase of the property delivered in bailment, such as dividends on stock and the young of domestic animals belong to the bailor.

The bailee has the right of possession of the bailed property and may assert this right against every one save the owner who would wrongfully deprive him of his possession, or who injures the property, and to the extent of his lien for services or expenses incurred on the property may retain possession as against the owner.*

Sec. 674. BAILOR'S DUTY TO THE BAILEE. —It is the duty of a bailor to notify the bailee of any danger connected with the charge of the property bailed or the service to be rendered. Thus, if a vicious horse cause injury to a blacksmith, who was not told of the danger, the owner would be liable for the injury.

* "There is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his contract for restitution, the bailor having still left in him the right to a chose in action, grounded upon such contract. And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distrainor, and the general bailee may all of them vindicate, in their own right, this their possessory interest, against any stranger or third person." (2 Bl. Com. 453.)

Sec. 675. TERMINATION OF THE BAILMENT.—The bailment contract, when express, will be terminated when it has been performed according to its terms; when the contract is implied it is terminated when completed according to the implied terms, which are, the return of the property on demand of the owner, the charges being paid or tendered to the bailee. Of course it may be terminated without the redelivery by the destruction or loss of the property, and the like, all of which methods will be considered in discussing the various classes of bailees.

Sec. 676. BAILMENTS CLASSIFIED.—There are various classifications of bailments by authors, more or less similar, and founded upon the same principles.* We shall give two of these classifications, the first, called the Roman classification, because borrowed from the Roman, or Civil, law, is followed by many writers; the second, or English, classification, is a simple and logical division of bailments, so that the rules of law appertaining thereto may be speedily and easily applied.

Sec. 677. SAME SUBJECT—THE ROMAN CLASSIFICATION.—In the Roman Classification

*Judge Cooley, in his edition of Blackstone, gives Lord Holt's classification of bailments in the case of Coggs v. Bernard, which is essentially the Roman classification, also Sir Wm. Jones' classification, which differs slightly from that of Lord Holt, and then states that there are four kinds of bailments, reducible to two general heads: "1. Bailment of goods to be kept, carried or manufactured with or without reward. 2. Hiring of goods, with or without payment." (2 Bl. Com. 451, note.)

there are six sorts of bailments, designated according to the kind of service to be rendered, and whether or not compensated, these are:

1. "Depositum," or deposit. By which is meant a naked bailment of goods to be kept for the bailor without recompense.

2. "Mandatum," or commission. A bailment of goods, also without reward, to have some act performed about them, or simply to be carried from place to place.

3. "Commodatum," or loan. Which is a gratuitous bailment or loan of goods to be used by the bailee for a certain time or specified purpose.

4. "Pignus," also "vadium," or pledge. This is a bailment of goods by a debtor to his creditor in pledge, or as security for the payment of a debt or the performance of an obligation. This includes pawns.

5. "Mutuum," or loan for consumption. This was a sort of bailment in which the goods could be consumed by the bailee, and repaid in others of the same kind, as in the bailment of corn or oil, to be returned in like amount, but not the identical property. This is not recognized as a bailment in English law.

6. "Locatum," or hiring. This sort of bailment is always for reward, and includes four kinds of hiring:

(a) Hiring of a thing for use, as a livery rig.

(b) Hiring of work and labor upon a thing.

(c) Hiring of care and services.

(d) Hiring of the carriage of goods.*

*For the Latin terms designating the different sorts of hiring see note to Cooley's Bl. Com. II., 451.

Sec. 678. SAME SUBJECT—THE ENGLISH CLASSIFICATION.—In this classification bailments are of three sorts, as follows:

1. Bailments that are exclusively for the benefit of the bailor, or for a third party other than the bailee.

2. Bailments exclusively for the benefit of the bailee.

3. Bailments that are for the benefit of both bailor and bailee, the last division embracing the bailments which are of the most importance in bailment law.

Sec. 679. GRATUITOUS BAILMENTS, DEPOSITUM AND MANDATUM CONSIDERED.—By a gratuitous bailment is meant one in which the bailee, depositary or mandatary receives no reward for his services in behalf of the bailor. It is but reasonable that he should not be held to the same degree of diligence as a bailee who receives reward for his services. Hence is it to be expected that the law, which its ablest expounder, Lord Coke, called the "perfection of wisdom," should make a distinction between gratuitous and paid bailees, and this it does. So a person who receives goods on deposit without reward and without specially undertaking to be answerable for their safety, or to do some act in regard to them without reward, is required to exercise only slight diligence in the care of such goods, and will not be responsible for loss or damage of the goods, unless such loss or damage be shown to be the result of his gross negligence. (Spooner v. Mattoon, 40 Vt. 300; Bronnenburg v. Charman, 80 Ind. 475; Hibernia Bldg. Assoc. v. McGrath, 154 Pa. St. 296.)

Sec. 680. SAME SUBJECT—THE DEGREES OF DILIGENCE AND NEGLIGENCE.—In the last section we used the terms "slight diligence" and "gross negligence," hence it becomes necessary in this connection to explain briefly the degree or gradations of diligence and negligence.

These terms, which are opposites of each other, are commonly considered in law as being divisible into three degrees each; a degree in the one case opposing a like degree in the other. Thus, ordinary diligence opposes ordinary negligence; slight diligence opposes extraordinary or gross negligence, and extraordinary diligence opposes slight negligence.

Diligence, or due care, is the measure of the bailee's obligation in the absence of express contract enlarging or diminishing his responsibility. Just what constitutes due care is hard to determine. It has been defined to be the exercise of such care and diligence as the circumstances demand,—which is practically no definition at all. But by a division of diligence into three degrees we may approximate the due care required of any particular class of bailees.

Slight diligence is such as even careless men use in dealing with their own concerns. It is the lowest degree of diligence which will excuse the bailee, and is usually the test of the gratuitous bailee's responsibility. The failure to use even slight diligence constitutes gross negligence on the part of the bailee.

Ordinary diligence is such diligence as men of common and ordinary prudence exercise in respect to their own affairs. It is a higher degree than slight diligence,

and failure to exercise this degree of diligence constitutes ordinary negligence on the part of the bailee. It is generally the test of responsibility in mutual benefit bailments, or bailments for reward.

Extraordinary diligence is the highest degree of diligence, and is said to be that which very prudent men use with respect to their own concerns. Failure to use this degree constitutes slight diligence on the part of the bailee. Extraordinary diligence is required of bailees who get the sole benefit of the bailment, also of certain special bailees upon whom the law imposes greater diligence because of the nature of their calling. (Hulett v. Swift, 33 N. Y. 571.)

Negligence is the absence of diligence, or the omission of any duty. In Steamboat New World v. King, 16 How. 471, the rule distinguishing between slight, ordinary and gross negligence is criticised on the ground that any negligence on the part of the bailee, resulting in damage to the bailor, ought to charge the former with the liability. Negligence of any degree being considered a legal fault. And, on the other hand, if one has not committed a legal fault, he is not negligent. (Beach on Contrib. Neg., Sec. 18.)

Sec. 681. SAME SUBJECT—THE CIRCUMSTANCES AS A TEST OF DUE CARE.—Aside from the mere question of recompense as determining the degree of care and diligence required of the bailee, due care is to be determined by the circumstances of the bailment. The standard of due care varies with the circumstances and the situation of the parties. Thus, a party should exercise greater care over a box of

jewels than over less valuable and more bulky articles; so the usage of the community, customs of trade, and the general course of business, are important factors in determining whether or not the bailee has exercised due care under the particular circumstances. This question of due care is usually left for the jury to determine from the facts presented to them, under instruction from the court as to the principles of law governing. If the facts are not disputed, the question whether or not due care has been exercised may be decided by the court. (Smith v. First Natl. Bank, 99 Mass. 605; Griffith v. Zipperwick and Lodge, 28 Ohio St. 388.) And the degree of hazard necessarily involved in a bailment may assist in determining the degree of care required of the bailee. (Idem.)

Sec. 682. SAME SUBJECT—WHEN BAILMENT IS DEEMED GRATUITOUS.—A bailee who regularly receives compensation for similar bailments will not be allowed, in case of loss, to set up a mental reservation not to charge for his services. (Schouler on Bailments, Sec. 35.) So, if the bailment is simply accessory to some other paid service, the bailment is for hire, thus a person riding on a drover's pass is riding as accessory to the contract of shipment, and it is held that the carrying is for hire.*

Sec. 683. SAME SUBJECT—LIABILITY OF DEPOSITARY.—A depositary is a gratuitous bailee,

*Schouler on Bailments, Sec. 348; Railroad Co. v. Lockwood, 17 Wall. 357; Ohio & Miss. Ry. Co. v. Selby, 47 Ind. 471; Annas v. Milwaukee, Etc., Ry. Co., 67 Wis. 46, 58 Am. Rep. 848.

and as such is only required to exercise slight diligence; in general they are simply bound to exercise good faith in the care and management of the goods left with them. But if a depositary is in the habit of dealing in a grossly negligent way with his own goods, this will not suffice to excuse him for dealing in the same manner with the property of another person left in his care. (Edwards on Bailments, Sec. 65.) Though, according to Kent, a depositor of goods can exact no greater degree of care than he has reason to expect from the known habits of the bailee. (2 Kent's Com. 561.)

A depositary is not responsible for loss by theft or robbery, or for loss by fire or other cause, unless he has negligently exposed the property to danger. (Foster v. Essex Bank, 17 Mass. 479; Scott v. Natl. Bank, 72 Pa. St. 471.)

As a rule the depositary has no right to use the thing deposited, save where the use is necessary to its preservation. Any other use of the bailed article by the bailee amounts to a conversion of the property. (Hartop v. Hoare, 2 Strange, 1187.) If the use by the bailee is assented to by the bailor, it converts it into a mutual benefit bailment. (Schouler, Bail., Sec. 61.)

Sec. 684. SAME SUBJECT—WHO ARE DEPOSITARIES—A finder of lost goods who voluntarily assumes the care of them is liable as a depositary. (Story, Bail., Secs. 86-7.) He may defend his right to the goods against all save the owner. The finder should restore the goods to the owner when discovered, and is not generally entitled to compensation for finding and returning them. But where he is put to any expense in

regard to the goods, he is to be recompensed for the outlay, though he has no general lien for such compensation. He is to exercise good faith in so exposing the goods that they may be identified by the owner. Whether he has used good faith in allowing identification is a question of fact and not of law, hence it is for the jury to determine in dispute. A finder of lost goods has a lien for the reward offered on them. (Wood v. Pierson, 45 Mich. 313.)

Goods are said to be lost when the owner has accidentally and involuntarily parted with the possession of them, but where a pocketbook is thoughtlessly left or mislaid on a table in a store, it is held not to be lost in the eye of the law. (McAvoy v. Medina, 11 Allen, 548.) But where a pocketbook was picked up off the floor it was held to have been lost. The question becomes material when two or more persons claim the article, as a stranger or clerk who picks up the lost article and the person who owns the store or place where the article is found. If the article is lost it belongs to the finder alone, unless the owner can be found. See Livermore v. White, 74 Me. 452. And this rule applies to servants or employes who find money or property while at work for the master.

A bank by accepting a special deposit becomes liable as a depositary. By a special bank deposit is meant the placing of money, gold, or other like property with a bank upon the agreement that the identical thing deposited is to be returned. (Foster v. Essex Bank, 17 Mass. 479.) A mere placing of money in bank to be checked against creates the relation of debtor and

creditor, and not that of bailor and bailee. The bank, by accepting a gratuitous special deposit, becomes liable only for gross negligence on the part of its officers or agents, and is only required to use the usual and ordinary care in dealing with such deposits as the line of its business demands. So it is held that the bank is not liable for the fraudulent or felonious acts of its agents as to such deposits. But if the bank, knowing of the incompetency of its agents, or having reasonable grounds to suspect their integrity, fails to remove them, this may be construed to be gross negligence. (Foster v. Essex Bank, supra; Scott v. Natl. Bank, 72 Pa. St. 471.) The bank is only obliged to exercise the same diligence which it exercises with respect to the corporate funds, and is not required to put the deposit in the innermost department of its vaults, if they are kept in a reasonably safe place. (Griffith v. Zipperwick, 28 Ohio St. 388.)

Corporations doing a general banking business have implied power to receive special deposits for safekeeping, and so have National banks, organized under the United States banking laws.*

Sec. 685. SAME SUBJECT—MANDATARIES. —The duties of mandataries, or those who accept a gratuitous commission, are similar to those of depositaries; the service being gratuitous, they are only liable for gross negligence in its performance. The goods must be actually received by the mandatary to bind him;

*Rev. Stat. U. S., Sec. 5228; Wylie v. Northampton Nat'l Bank, 119 U. S. 361; Bank v. Zent, 39 O. St. 105.

an executory contract to receive a mandate being void for want of consideration. (Story, Bailments, Sec. 169.) In doing the act or performing the commission in regard to the goods, the mandatary is not liable for a nonfeasance, that is, for not doing the particular service, but he does render himself liable for a misfeasance, or such negligence as renders his action wrongful. (Coggs v. Bernard, 2 Lord Raym. 909; Hibernia Bldg. Assoc. v. McGrath, 154 Pa. St. 296.) The mandatary, as other bailees, is required to proportion the care and diligence according to the character of the service he assumes to perform, or the nature of the property he accepts. (Conner v. Winton, 8 Ind. 315; Newell v. Newell, 34 Miss. 385.)

Certain services which are rendered gratuitously for persons or property deserve special mention as irregular mandates. In these there is no delivery of property as in a regular "mandatum." Examples of these irregular mandates are, advice given gratuitously by an attorney, or services rendered gratuitously by a physician. Only ordinary care is required, but, as they are presumed to have professional skill and knowledge, they must answer for neglect to use such ordinary skill and care as is usual with men in similar professions. (Stanton v. Bell, 2 Hawks, 145; Isham v. Post, 141 N. Y. 100.)

Sec. 686. COMMODATUM OR GRATUITOUS LOAN.—This is a loan of an article to be used by the borrower, or bailee, without paying for the use. Hence the bailee gets the benefit of the bailment, that is, the

gratuity is on the part of the bailor. This fact makes a change in the degree of care required of the bailee. And the law requires of such a bailee the highest degree of care and diligenec with respect to the borrowed property, and holds him responsible for loss arising through the slightest negligence on his part. (Coggs v. Bernard, supra; Hagebush v. Ragland, 78 Ill. 40; Carpenter v. Branch, 13 Vt. 161.)

To constitute such a loan there must be an article of personal property which is loaned without reward, for the sole use of the borrower, and the specific property to be returned upon the determination of the bailment purpose. (Fosdick v. Green, 27 Ohio St. 484.)

The lender of property to be used gratuitously has a right to have the loan considered strictly personal, and the use of it confined strictly to the purpose contemplated, and for the length of time agreed upon or necessary to accomplish such purpose. Any use of the article beyond this amounts to a conversion. (Wheelock v. Wheelwright, 5 Mass. 104; Schouler, Bailments, Sec. 78.)

The borrower is not, however, made an insurer of the loaned property. A common mistake as to the liability of borrowers is made through the custom of some borrowers to make good any loss or accident which happens to the loaned property while it is in their possession. This may be commendable as a matter of courtesy, but it is not required of them by the law. The owner of the property takes the risk of any loss from ordinary wear and tear, also loss by theft, robbery, fire, or inevitable accident and for injury or damage, caused by

third persons. (Wood v. McClure, 7 Ind. 155.) The borrower is liable only in case he is grossly negligent. (Beller v. Schultz, 44 Mich. 529.)

A borrower may make a special contract in regard to his liability, and in such case the contract will govern, and he may thus make himself liable for any loss, however occurring. (38 Ind. 472.)

Sec. 687. SAME SUBJECT—TERMINATION OF BAILMENT.—At the civil law a loan of property made for a definite time could not be revoked before the expiration of the time. But at common law the lender may disregard the contract and revoke the loan at will, as there was no consideration for the promise that the bailee might have the property a specified time. (Schouler, Bailments, Sec. 87.) So the bailee may determine the bailment at any time by returning the property; and the death, insanity, guardianship or bankruptcy of either party may terminate the bailment. (Orser v. Storms, 9 Cowan, 687; Browne, Bail. 20.)

Sec. 688. PIGNUS, OR PLEDGE, CONSIDERED.—This is a mutual benefit bailment, that is, for the benefit of both the bailor and bailee. Hence the law requires of the bailee a greater degree of care than when the service is gratuitous; and not as much care as when the benefit is all for the advantage of the bailee. He is in general bound to use ordinary diligence in regard to the pledged property; this includes: Retention of the property; and the taking of such active steps as may be necessary to preserve and protect the property from loss, as the presenting of nearly due commercial

paper for payment and the taking of the steps necessary to charge the parties thereto, or the collection of overdue paper and the application of the proceeds to the debt for which the pledge was given. (Bridge Co. v. Savings Bank, 46 Ohio St. 224; 78 Pa. St. 334.)

A pledge is made to secure a debt or obligation owing by the pledgor to the pledgee, and from this arises certain important principles: The pledgee has a right to retain the pledge until the debt or obligation is settled, but if he voluntarily abandons the possession of the pledge his security is lost. (Citizens' Natl. Bank v. Hooper, 47 Md. 88.) The pledgee may assign or repledge the property if he does not divest the pledgor of his property right in the article. If the article pledged is a security he may apply the sums collected to the payment of his claim against the pledgor; and in case the pledgor defaults in meeting his obligation he may perfect his title to the pledged articles. The methods in which he may secure the title will be considered in the succeeding sections.

Sec. 689. SAME SUBJECT—DISTINGUISHED FROM MORTGAGE.—A pledge is to be distinguished from mortgage though it closely resembles a chattel mortgage. In a chattel mortgage the legal title passes to the mortgagee upon the condition that if the sum secured by the mortgage is repaid the title of the mortgagee is to be defeated; this condition is called the defeasance clause. In pledge the title does not pass to the pledgee, he acquires merely a possessory lien upon the article, subject to be defeated by payment or performance of the obligation, or, on the other hand, to ri-

pen into a legal title by taking certain steps after the default of the pledgor. (Schouler on Bailments, Secs. 163-170.)

Sec. 690. SAME SUBJECT—WHAT MAY BE PLEDGED, AND BY WHOM.—Any and all kinds of visible and tangible personal property, and choses in action evidenced by written contracts may be pledged. (Schouler, Bailments, Sec. 166.) The pledge may be made to secure any lawful debt, or the performance of any legal contract.

And any one having title and possession of personalty may pledge it. When pledged, as between the pledgor and pledgee the pledge is valid, though the pledgor had but the possession and not the title to the property, but the true owner can recover the pledge though the pledgee has made advances in good faith upon the property. This rule protecting the owner of property from being divested of it by a wrongdoer, is modified by the statutes licensing, regulating and protecting pawnbrokers; another exception to the general rule is in the case of negotiable paper, which a bona fide pledgee may hold, though secured from one having only the possession. (98 Mass. 303.)

Persons having possession of property in a fiduciary capacity, as guardians and executors, may make a binding pledge of such property, though it is a breach of trust on their part. The pledgee in such case must have acted in good faith to be able to hold the property for advances. (7 Johns. Ch. 150.) Factors and commission merchants had no authority at common law to pledge property belonging to their principals, but by

statutes known as "Factors' Acts," in a number of States they are authorized to do so.

Sec. 691. SAME SUBJECT—DELIVERY IN PLEDGE.—Delivery of the property to the bailee is necessary in all bailments. In pledge it is especially necessary since it is only while the pledgee has possession that he has security for his debt. But this delivery may be actual, or constructive; and even a symbolical delivery, as of a bill of lading, is sufficient in certain cases. (Jewett v. Warren, 12 Mass. 300; Dowd. v. Na. Bank, 91 U. S. 618.) So a breach of an executory agreement to deliver in pledge gives a right of action, there being a consideration in this case. (Story, Bailment, Sec. 297.) Where the pledgor remains in possession as the agent of the pledgee, the authorities are in dispute as to the nature of the transaction; some hold that it constitutes a mortgage of the property (Schouler, Bailments, Sec. 182); others hold the contract good as between the parties if bona fide, and allow the pledgee to assume actual possession and defeat attaching creditors. But under the Ohio statutes, in regard to one person claiming property in the possession of another, the creditors of the owner could attach and defeat the pledgee.* In general specific property must be appropriated to the pledge or it will be invalid.

*In a New York case, where the owner of property gave a mere statement of the fact of the pledge to one creditor and retained possession as agent of the pledgee, the courts held the agreement good as against attaching creditors. (54 N. Y. 19; contra, see Schouler, Bailments, Sec. 182.)

A summary of the American authorities regarding delivery in pledge, may be given as follows: As between the parties to the pledge, the security may be held though there was no actual change of possession; this is the doctrine of constructive delivery. As between the parties and general creditors, such a transaction is good unless fraud can be shown. But as against those acquiring rights upon the pledged property without notice of the pledge, the pledgee who has not taken full possession, generally fails to hold the property alleged to have been pledged. (In Ohio this is true under the recording laws. Rev. Stat. Ohio, Sec. 4151.) Otherwise, when a purchaser or other third person gets possession of pledged property without fault of the pledgee, such holder cannot give title even to a bona fide purchaser from him, the only exception to this rule being in the case of negotiable paper. (Story, Bailments, Sec. 299; Treadwell v. Davis, 34 Cal. 601.)

Sec. 692. SAME SUBJECT—RIGHTS OF THE PLEDGEE.—As a general rule, if the use of the pledged property will not injure it, the pledgee may use the pledged property (Lawrence v. Maxwell, 53 N. Y. 19); so, if its keeping be very expensive, he may use it in a reasonable manner in order to defray such expenses. But all profits made as a result of such use must be credited upon the debt. So, where the use is necessary to preserve the pledge, as to exercise a horse, or milk a pledged cow, it is the duty of the pledgee to so use the property. (Story, Bailments, Sec. 329; Red-

field on Bailments, p. 527; Geron v. Geron, 15 Ala. 558.)

If a pledgor defaults the pledgee may file a bill in equity to foreclose and obtain a judicial sale; or he may have a receiver appointed;* or he may sell the pledge publicly and fairly without judicial process after giving reasonable notice to the pledgor to redeem. Notice to the pledgor is always required. The sale, when made, should be a public one, and the pledgor should have notice of it. Pledged securities, when paid in whole or in part, may be applied towards the payment of the debt. So, the pledgee may sue the pledgor personally, and attach the pledged property, but such an attachment is construed to work a waiver of his pledge lien. (Drake on Attachments, 540; Schouler, Bailments, Sec. 190.)

The pledgor ratifies a sale by the pledgee, by accepting the surplus proceeds. (Hamilton v. State Bank, 22 Ia. 306.)

Articles held in pawn or pledge cannot be retained for any other debt or claim than that for which the goods were pledged, unless the agreement was that they should secure such other debts.

Sec. 693. MUTUUM CONSIDERED.--This is really no bailment under our law. The term is from

*The remedy by foreclosure is necessary where notice cannot be given personally to the pledgor; and is the safest method where the pledge consist of an article or securities without a recognized market value, as bonds, stocks, and the like. (Browne, Bailments, 32; Strong v. Nat'l Bank Assoc., 45 N. Y. 718.)

the Civil law, and indicated a deposit of goods to be consumed, and returned in goods of like kind. Such a contract in American law amounts to a sale, a few cases to the contrary.*

Sec. 694. LOCATUM, OR HIRED SERVICES IN CONNECTION WITH A CHATTEL.—We have already seen (Sec. 677) that bailments of this sort are divided into four classes: (a) Hiring of a thing for use, as engaging a livery rig. (b) Hiring of work and labor upon a chattel, constitutes an implied bailment service, common examples of which are the employment of a blacksmith to shoe a horse, a tailor to make a suit from cloth furnished, and the like. (c) Hiring of care and service, thus, the simple employment of one to assume the care and custody of a chattel involves a bailment service, examples of which are, warehousemen, wharfingers, innkeepers, managers of parcel rooms, and the like. These being bound to use ordinary care and skill in keeping and protecting the articles placed in their custody, unless for special reasons the law has increased their liability. (d) Hiring of the carriage of goods.**

*Benjamin on Sales, Sec. 2; and cases there cited.

In Inglebright v. Hammond, 19 Ohio, 337, it is held that where one delivers wheat to a miller, and it is put into a bin with other wheat of the miller, and so much flour is to be returned to the owner of the wheat, that this is a bailment, and it is not necessary that the flour to be delivered should be made out of the identical wheat delivered. Many cases in other States hold the contrary of this. (Johnston v. Beaver, 37 Ia. 200; Rice v. Nixon, 97 Ind. 97.

**Warehousemen. A warehouseman is one who stores goods in a building for reward. He is held only to ordinary

Sec. 695. SAME SUBJECT—MEASURE OF LIABILITY.—Ordinary care and skill is required of bailees for hire, hence ordinary care is the measure of their liability. As has been seen, if the bailment service is rendered by one in connection with a calling or profession in which special or technical knowledge or skill is required, the bailee assuming to exercise such a profession must employ such knowledge and dexterity as prudent and competent men of the same profession and in the same locality employ in the like occupation.

Sec. 696. SAME SUBJECT—RIGHT TO COMPENSATION FOR SERVICE.—Upon performing the desired service the bailee, who has been engaged to perform a bailment service, becomes entitled to full

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care, and is not liable for goods stolen by his employes, nor for loss by fire, unless he is negligent. His ordinary care extends to seeing that the warehouse is safely constructed and guarded. For falsely representing his building to be fireproof he will be liable for loss by fire. (Hickey v. Morrell, 102 N. Y. 454; 31 Tex. 77; Browne, Bailments, 50.

Wharfingers. A wharfinger is a person keeping a wharf for the receipt of goods for hire. (Rodgers v. Stophel, 32 Pa. St. 111.) His responsibility is similar to that of a warehouseman, his duty being to exercise ordinary care in the guarding of the goods, and the construction of the wharf and landing. (Barrett v. Black, 56 Me. 498; Willey v. Allegheny City, 118 Pa. St. 490.

Agisters. An agister is one who pastures cattle for hire. He is charged with ordinary care only, and is only answerable for ordinary or gross negligence. He must keep his grounds fenced, and protect the bailed animals from infection by disease from other cattle of his own. (Sargeant v. Slack, 47 Vt. 674; Browne, Bailments, 47, 48.)

In the next chapter, under the head of Exceptional Bailees, Innkeepers, Carriers, Postmasters, and Express and Telephone Companies will be considered at length.

compensation for such service, if performed according to the contract and in a reasonably careful and workmanlike manner. There is some difference of opinion as to whether a bailee is entitled to pay for a partly performed service. Where there was no default or negligence on the part of the bailee, as in the case where a partly completed carriage was destroyed by fire, the bailor must compensate for the work done. (Story, Bailments, Sec. 426.) But this rule may be changed by express contract, and does not apply where the workman furnishes both the work and the materials from which an article is to be manufactured. The earlier rule was, that if the bailee was in default for not completing the service, he could recover no compensation whatever. (Denew v. Daverell, 3 Camp. 451.) The later cases give the workman compensation for the part he has done, that is, allow him to recover on a quantum meruit, less damages for the breach of the agreement. So, where he has rendered services different from those which were contracted for, he is allowed to recover on a quantum meruit, and from this amount the bailor can offset damages for the breach of the contract.

Sec. 697. SAME SUBJECT—BAILEE'S LIEN FOR SERVICES.—The bailee has a lien for his work or services. Generally such a lien can exist only when the bailment service has been rendered with the knowledge and consent of the owner. (Small v. Robinson, 69 Me. 425.) But if the service is done on the property at the instance of one whom the owner has permitted to treat the article as his own, the bailee's lien will hold

though the charge is made to such person. (White v. Smith, 15 Vroom, 105.) The bailee's lien covers every part of the property delivered on one contract for work, on any part of it, but he cannot charge a part on which he fails to perform agreed work for work on any other part. (Hensel v. Noble, 95 Pa. St. 345; Pierce v. Schenk, 3 Hill, 28.)

The lien of the bailee may be waived or lost by a voluntary surrender of the entire property to the bailor, or by refusal to deliver the property to the bailor on some other ground than that of the lien. (Sensenbrenner v. Matthews, 48 Wis. 250; Hanna v. Phelps, 7 Ind. 21.) So, if the bailee agrees to give the bailor credit, or to look to some third person for his compensation, the lien will be waived. (Browne, Bailments, 60-61.) The lien is superior to the right of attaching creditors, and assignees of the bailor. But is discharged on payment or tender of the amount due.*

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* "Most bailees for reward have a lien upon or right of retaining the thing bailed, until they have received their remuneration, with this obvious exception, that the nature of the bailment be not such as necessarily to preclude the bailee from claiming the uninterrupted possession of the chattels, as in the case of a horse-trainer. (5 Mee. & W. 350.) The common law right of lien arises in three cases: first, where the bailee has bestowed labor or expense to alter or improve the chattels (5 Mau. & S. 180); secondly, where the bailee was compellable to receive the chattel, as in case of a carrier or innkeeper (2 B. & Ald. 283); lastly, where the party in possession has saved the chattel from peril by sea, or has recovered it after actual loss at sea, or capture by an enemy; in which case he may retain it until he is remunerated for the salvage. (Ld. Raym. 393; 8 East, 57.) A lien is special; i. e., confined to the particular demand which arises in respect of the thing de-

tained, unless extended by special agreement or by the usage of the particular business, into a general lien, for the entire balance due in respect of the mutual dealings of the parties in that business. This general lien has been allowed in the case of a factor (4 B. & Al. 27), wharfinger (McClel. & Y. 173), packer (1 Atk. 228), calico printer (3 Esp. 268), insurance broker (2 East, 523), stereotype printer (Mood & M. 465), attorney (Doug. 104; 2 Hare, 177). But carriers are not entitled to such a general lien, and the courts do not encourage usages of this nature. (7 East, 229.) The lien of an innkeeper is necessarily general. (7 Car. & P. 67; see 3 Mee. & W. 248.) Note to Cooley's Bl. Com. II. 451.

The student is also referred to what has been said concerning liens under the subject of Agency in this number of the Home Law School Series

CHAPTER III.

EXCEPTIONAL BAILEES CONSIDERED.

Sec. 698. WHY CALLED EXCEPTIONAL BAILEES.—In the present chapter we have to consider certain classes of bailees, who, by reason of the special and peculiar rules of law governing their liability, may be termed exceptional bailees. The policy of the law, as we shall see, varies the measure of their several liabilities without regard to the principles which we have seen usually governing in bailments. Thus, the liability of a common carrier is complete, and he is said to be an insurer; the liability of the innkeeper is less extensive, while in the case of government officers there is scarcely any liability at all. Chief among these exceptional bailees are innkeepers, postmasters, and common carriers, whether of personss or goods, also express and telegraph companies. These we shall consider in their order.

I Innkeepers.

Sec. 699. AN INNKEEPER DEFINED.—Whoever keeps his house open regularly and for reward as a public house, for the lodging, refreshing and entertainment of travelers, is an innkeeper.

In early times to constitute an innkeeper the person had to entertain the traveler's horse, as well as himself, but now there may be an inn without the inn-stables. (Pinkerton v. Woodward, 33 Cal. 557.) The requisites

of an inn are: a public house, open to all comers (Wintermute v. Clarke, 5 Sandf. 247), furnishing lodging and entertainment regularly (Howth v. Franklin, 20 Tex. 798), to travelers, and for reward. (Dickerson v. Rodgers, 4 Humph. 179.)*

Sec. 700. WHO ARE NOT INNKEEPERS.—Certain public resorts, which might apparently be deemed inns, are not so considered in law; thus, saloons, public houses, restaurants, and the like, furnishing only food and not lodging, are not inns. (Mulliner v. Florence, 3 Q. B. Div. 484; 35 Conn. 183.) The importance of making the distinction lies in the fact that a different degree of care is required of the innkeeper than of those who are not innkeepers.

And boarding-house, or lodging-house keepers are not innkeepers, since they do not hold themselves out to keep travelers, and their liability is not so extensive as innkeepers. If any property of the boarder or lodger is given them to keep, their liability is governed by the ordinary rules applicable to bailees, no special care being required of them. (Clark v. Burns, 118 Mass. 275; Pinkerton v. Woodward, supra.)

So, sleeping-car companies and steamship companies, as a rule, are not deemed to be innkeepers,

*Many old rules applying to inns in stage coach days, when the wayside inn was of so much importance in travel, have lost much of their former force and significance by the wonderful changes in the method of transportation. And by statutes in the various States innkeepers have been exempted, more or less, from the excessive liability imposed upon them by the policy of the common law.

though passengers are lodged and fed by them.* The reason sometimes given for their not being held to the strict liability of an innkeeper is, that the liability of innkeepers was developed in earlier times, when the danger from lawlessness was great, and this was a necessary provision to secure the safety and protection of travelers. Now that the reason of the rule of stricter liability is practically at an end, it is claimed that the severity of the rule should be modified. Again, it is urged in favor of sleeping car companies that the company does not have full control of its cars, they being in charge of the conductor of the railway company who may enter to take tickets, etc., hence their business is to be distinguished from that of an innkeeper.

Sec. 701. INNKEEPER'S LIABILITY CONSIDERED.—The general doctrine is that the innkeeper becomes the insurer of the guest's property in the inn, and that he is liable for its safekeeping and return to the guest, unless he can show that the loss or damage was caused by the act of God, the public enemy, or the negligence of the guest or his servants. (Hulett v. Swift, 33 N. Y. 571; Sibley v. Aldrich, 33 N. H. 553; Clute v. Wiggins, 14 Johns. 175; Story, Bailments, Sec. 465.)

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*Pullman Palace Car Co. v. Smith, 73 Ill. 360; Pullman Pal. C. Co. v. Gavin, 93 Tenn. 53; 42 Am. St. Rep. 902. Contra. see Pullman Pal. C. Co. v. Lowe, 28 Neb. 239, 26 Am. St. Rep. 325.

In the last case the Pullman Company was held responsible for the loss of a passenger's overcoat given to the porter, on the ground that it was practically an innkeeper, and subject to the same rules as to its liability.

The innkeeper is held to a greater degree of care than ordinary bailees, some cases holding, as above, that he is liable for all losses to property of the guest brought within the inn, unless he can show positively that he was free from negligence. Under this rule he is excused only for losses arising from inevitable accident, styled also act of God, the public enemy, and the negligence of the guest. (Walker, Am. Law, "Bailments.") Schouler states the true rule as to the innkeeper's liability to be, that he is bound to take extraordinary care, and further it is said that he guarantees the good conduct of all persons admitted to the inn, is liable for goods stolen from the inn, but is not liable for purely accidental casualties, riots, or force from without. (Schouler, Bailments, Sec. 261; Cutler v. Bonney, 30 Mich. 259.) Other authorities simply hold him to a very high degree of care, and relieve him from loss by fire, robbery and the like. (Browne, Bailments, 81; Johnson v. Richardson, 17 Ill. 302; Howth v. Franklin, 20 Tex. 798.)

Sec. 702. SAME SUBJECT—FOR WHAT PROPERTY LIABLE.—The innkeeper is said to be liable for all the property, whether money or valuables, of the guest brought within the inn, to any extent. (Armistead v. Wilde, 17 Q. B. 261; Walsh v. Porterfield, 87 Pa. St. 376; Smith v. Wilson, 36 Minn. 334.) But for this exceptional liability to apply, the owner of the goods must be a guest at the inn. (Taylor v. Downey, 62 N. W. Rep. 716.) The liability for the property of the guest begins as soon as the goods are brought within the walls of the inn. Thus, a sleigh loaded with

grain placed in an adjoining outhouse, where such goods were usually placed, was held to be within the inn. (Clute v. Wiggins, 14 Johns. 198.) And it is held that the liability attaches before the goods come within the inn, as where they are given into the custody of the inn porter at the railway station. (Browne, Bailments, 84.) But where the guest assumes exclusive charge of the goods the innkeeper is not responsible for them. (Fuller v. Coates, 18 O. St. 343.) He may refuse to receive offensive, perishable, bulky, or injurious property, but if received he is liable for its safekeeping. (Howe Machine Co. v. Pease, 49 Vt. 477; Hilton v. Adams, 71 Me. 19.)*

Sec. 703. SAME SUBJECT—LIABILITY AS TO THE PERSON OF THE GUEST.—The inn-

*It will be noticed that the decisions are not uniform as to the innkeeper's liability, some holding him to be almost an insurer, others excusing him from liability for loss arising from accidental casualties without negligence on his part.

Also by statute in some States the liability of the innkeeper is modified, as by reducing his liability for losses by fire, and providing that the guests's valuables shall be kept in a safe, and if the guest fails to deliver them up to be put in the safe the innkeeper's liability becomes only that of the ordinary bailee. (Elcox v. Hill, 98 U. S. 218; Hyatt v. Taylor, 42 N. Y. 259; Stewart v. Parsons, 24 Wis. 241.)

The common law rule holding the innkeeper liable for all of the guest's property and to any extent is modified in some cases by the courts, and his liability limited to the ordinary baggage necessary for the journey, and suitable to the guest's station in life. (Pettigrew v. Barnum, 11 Md. 434; Noble v. Milliken, 74 Me. 225.) The last case holding that a reasonable amount of money, $40 contained in a trunk for traveling expenses, was proper baggage for which the innkeeper became liable. So are a watch, chain and jewels. (Maltby v. Chapman, 25 Md. 310.)

keeper's liability as to the person of the guest is not so strict as for the guest's property, for the evident reason that the guest is able to look after himself somewhat, and is not within the control of the innkeeper to the same extent as the property. Still, it is his duty to protect the guest while he is at the inn. He should protect the guest from assault or insult by his servants or others within the inn. (Rommel v. Schambacher, 120 Pa. St. 579.) He becomes liable for exposing the guest to contagious diseases, as smallpox, while at the inn. (Gilbert v. Hoffman, 66 Ia. 205.) And dare not eject a sick person from the inn, in a storm, and without covering, though the person is intoxicated and troublesome. (McHugh v. Schlosser, 159 Pa. St. 480.)

Sec. 704. SAME SUBJECT—OTHER DUTIES IMPOSED ON INNKEEPER.—He is to furnish lodging and entertainment to all who apply to the extent of his accommodations, if the applicants are suitable persons and able to pay for their accommodation. This is a duty which is imposed upon him by reason of the public calling which he has assumed, and he becomes civilly liable for refusing to accept suitable guests, and may also be indicted for such refusal. (Rex v. Ivens, 7 C. & P. 213.) He may demand his pay in advance, especially if the guest has no baggage or effects with him. And he may exclude disorderly or diseased persons and those unable to pay, or refuse to receive them. (Markham v. Brown, 8 N. H. 523.) But he may not select certain guests and exclude others while he has room.

Sec. 705. WHO ARE GUESTS.—Any person who visits an inn for the purpose of receiving lodging and entertainment, with no illegal purpose in view, is a guest. One becomes a guest by entering the inn and registering his name, or by depositing property, with the intention of staying and eating and sleeping at the inn. And it is held that the relation begins when the traveler hands his check to a porter at the station and enters the proper stage for the inn. (Browne, Bailments, 77; Coskery v. Nagle, 83 Ga. 696.)

The liability of the innkeeper depending on the relation of landlord and guest, he is not liable as such, where persons are attending a ball given by a fire company and leave articles with the servants to be cared for; and in the absence of negligence he will not be liable if such articles are lost. (Carter v. Hobbs, 12 Mich. 52.) So, one staying at an inn on a special contract by the week or month becomes a boarder, and is in no sense a traveler or guest, and his goods are protected only by the ordinary rules of bailees. Though it is held that it is not the mere fact of his paying by the week or the length of his stay that distinguishes him as a boarder, rather than a guest; the important test being, is, or is he not, receiving entertainment as a transient incumbent, with the right to leave at any time.*

Residents of a town boarding regularly at a hotel

*Hancock v. Rand, 94 N. Y. 1. In this case, a leading one, the late Gen. Hancock, was staying with his wife and family at a hotel, and had been there for seven months, having no permanent home at the time. Valuables belonging to the General were lost while in the inn, and the proprietor was held responsible on the ground that they were guests.

are not guests. (Schouler, Bailments, Sec. 256; Johnson v. Reynolds, 3 Kans. 257.) Neither is a person who, living in the town, takes lodging at the inn for an immoral purpose. (Curtis v. Murphy, 63 Wis. 4.)

A traveler becomes a guest as soon as he enters the inn, or even before, and it is not necessary for him to remain and take lodging to charge the innkeeper, the taking of dinner, purchasing a drink, and the like have been held to constitute one a guest. (Read v. Amidon, 41 Vt. 15; McDonald v. Edgerton, 5 Barb. 560.)

Sec. 706. WHEN THE LIABILITY CEASES.—The innkeeper's liability continues only while the relation of landlord and guest continues, and terminates when it ceases, except towards the baggage of the guest, as to which his liability continues for a reasonable time to effect its removal. (Miller v. Peeples, 60 Miss. 819; Adams v. Clem, 41 Ga. 65; Bendetson v. French, 46 N. Y. 266.) If the baggage is left any considerable period the liability changes to that of an ordinary bailee, but where the guest left at noon, leaving instructions to send his trunk by the four o'clock boat, and it was lost by sending it to the wrong boat, the innkeeper's stricter liability was held to continue and to make him responsible for the loss. (Giles v. Fauntleroy, 13 Md. 126.)

Sec. 707. CIRCUMSTANCES RELIEVING THE INNKEEPER.—The innkeeper may relieve himself from liability by showing negligence on the part of the guest or the guest's servants; also by showing that the guest had taken the care of the goods upon himself, or by his own neglect exposed them to peril.

Thus, if a guest takes his goods from his room and from the ordinary care and custody of the innkeeper, into his own exclusive custody and care, or puts them into a place not designated by the landlord, and unusually dangerous, the innkeeper is not liable if they are stolen or lost. And the innkeeper may make any reasonable and proper rules for securing the safety of the guest's goods, and if these requirements are not observed by guests having knowledge of them, and the goods are lost solely through neglect to follow them, the innkeeper will not be liable. (Fuller v. Coates, 18 Ohio St. 343.)

Sec. 708. LIABILITY LIMITED BY STATUTE.—By State statutes the liability of the innkeeper who provides a safe for the deposit of the guest's money and valuables, and complies with the statutory requirements, as to giving notice of the existence of the safe and the limitation of his liability, will not be liable for the loss of such articles not so deposited, unless lost by the theft or negligence of the innkeeper or his servants.* And as to other articles the innkeeper's liability may be limited to a stated amount to each trunk, valise or parcel of the guest, unless by special agreement with the guest he assumes liability for a greater amount.**

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*Rev. Stat. Ohio, Sec. 4427.

**Rev. Stat. Ohio, Sec. 4427a. This section provides that the liability of an innkeeper in Ohio shall be, as respects other property than money, valuables, and the like, that of a depositary for hire, and limits the amount to be recovered in any case to $150 for each trunk and contents, $50 for each valise,

Sec. 709. INNKEEPER'S REMEDIES FOR SECURING HIS REWARD.—The innkeeper is entitled to compensation from his guest for his entertainment and the care of his property, and this the law affords him various methods of securing: Thus, he is permitted to demand his pay in advance; is given a right to retain any baggage or property of the guest until his bill is paid; may bring a civil action against the guest for the amount, and frequently by statute, has a criminal action against the impecunious or misrepresenting guest for securing board and lodging with intend to defraud.*

The lien of the innkeeper for his reward covers all goods of the guest brought within the inn. (Grinnell v. Cook, 3 Hill, 485.) But the relation of guest must exist and the lien does not attach as against a mere boarder. (Mowers v. Fethers, 61 N. Y. 38.) It does not matter that the guest is not the owner of the goods; the lien attaches though he is a mere custodian or bailee of the property. The fundamental principle of law that the owner of property cannot be deprived of his property by a wrongdoer is superseded here because of the superior equity or right of the innkeeper to compensation for a service which he dare not refuse to render.

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and $10 for each parcel, unless by special written contract the liability is increased.

As against these modifications of his liability, in Ohio, the innkeeper is criminally liable as an embezzler for fraudulently convertng the guest's property, and punished as for larceny of the same amount. (Rev. Stat., Sec. 6844.)

*Rev. Stat. Ohio, Sec. 7076a. This section extends to boarding and eating-houses, as well as inns, but does not apply to regular boarders, or those who have been boarded on credit.

(Schouler, Bailments, Sec. 293; Singer Co. v. Miller, 52 Minn. 516; Cook v. Kane, 13 Oreg. 482.)

The landlord's lien at common law was a mere right to retain, without the right to sell. But now, by statutes in some States, he has the right to sell the property at open public sale. And State statutes may extend the lien of the innkeeper to cover the property of a mere boarder, or give the right of lien to a boarding-house keeper. (Browne, Bailments, 90.)

II Postmasters.

Sec. 710. POSTMASTER IS A PUBLIC OFFICER.—A postmaster is a public officer, and not technically a bailee. So the assistants or clerks in the office, appointed and sworn in as required by law, are public officers. The government is the bailee, and these officers are simply its servants. (Spence v. Harvey, 22 Cal. 336, 83 Am. Dec. 69.)

Sec. 711. THE RULE OF LIABILITY.—The government itself is not liable at the suit of individuals, because it is the supreme and sovereign authority, neither is it liable to individuals for the acts of its officers and agents. But the government may and does provide for adjusting and satisfying legitimate claims preferred against it, and unless it does so provide, there is no remedy.*

So, on grounds of convenience and public policy to prevent officers of government from being interfered with in the prosecution of their official acts, they are, as a rule, protected from suits by individuals, and in

*See Sec. 184, No. 2 Home Law School Series.

general are not liable to individuals for official acts, nor for the misfeasance or positive wrongs, nor for the nonfeasance, negligence or omissions of duty of their official subordinates.*

Sec. 712. SAME SUBJECT—EXCEPTIONS.—The postmaster and his assistants may be held responsible for any loss arising from a flagrant violation of instructions, or for their own willful and fraudulent misconduct. (Bishop v. Williamson, 11 Me. 495; Hutchins v. Brackett, 22 N. H. 252.) So, where it is the duty of the postmaster to employ his official subordinates, and he negligently employs unfit persons, fails to make them observe the regulations, or carelessly conducts the affairs of his office, he may make himself liable if loss results. Thus, where the postmaster was negligent in the management of the office, and allowed clerks in his store where the office was kept, to have access to and handle the mails, and a loss resulted by the theft of a letter, he was held liable. (Ford v. Parker, 4 Ohio St. 576.) He would also be liable where he authorized or co-operated in performing illegal or wrongful acts. (Fitzgerald v. Burrill, 106 Mass. 446.)

These rules apply to collectors of customs, and in

*A governmental officer, said Chief Justice Marshall, in Marbury v. Madison, 1 Cranch, 166, "is accountable only to his country in his political character, and to his conscience." But he may now be required to perform his ministerial duties. (Martin v. Ingham, 38 Kan. 641; Harpending v. Haight, 39 Cal. 189.) But for acts within the authority and power of the public officer, performed by him in the prescribed manner, he is granted immunity from suits at the instance of individuals. (Highway Commissioners v. Ely, 54 Mich. 175; Grider v. Tally, 77 Ala. 422; Keenan v. Southworth, 110 Mass. 473.)

some cases are held to apply to mail contractors (Conwell v. Voorhees, 13 Ohio St. 523; Hutchins v. Brackett, supra), but the better rule is said to be that mail contractors are not public officers, and hence become liable for the torts and negligences of their assistants and employes, independent of the question of their own negligence in employing them. (Mechem on Public Officers, Secs. 713, 791-795; Sawyer v. Corse, 17 Gratt. 230; Foster v. Metts, 55 Miss. 77.)

III Carriers.

Sec. 713. CARRIERS DEFINED.—Carriers include all persons engaged in the transportation of goods or persons; they are divided into, 1, Private or special carriers, and, 2, Public or common carriers.

Sec. 714. PRIVATE OR SPECIAL CARRIER CONSIDERED.—A private or special carrier is one who undertakes to carry goods or persons for reward only on some special occasions, and does not make hired transportation his general calling. Thus, where a farmer making regular trips to market to sell his farm products, carries the goods of merchants or others on his return trips, his carriages of these goods was held to be special and individual transactions, and did not constitute him a common carrier. (Samms v. Stewart & McKibben, 20 Ohio, 70.) The essential distinction between public and private carriers is the fact whether the carrier transports for everybody or for particular persons.

Sec. 715. SAME SUBJECT—THEIR LIABILITY.—The special carrier is only liable as an ordinary

bailee for hire, that is, he is only required to exercise ordinary care and diligence, unless by special contract he assumes a stricter liability. (Samms v. Stewart, supra.) The carriage of goods not being his chief calling, the law has not found it necessary to impose upon him the same responsibility which we shall see is imposed upon common carriers. Special carriage being for reward constitutes a mutual benefit bailment, the liability being the same as the ordinary bailee for hire, but the liability of a common carrier is enlarged on grounds of public policy. (Coggs v. Bernard, 2 Ld. Raym. 909; Fish v. Chapman, 2 Ga. 349.)

Sec. 716. PUBLIC OR COMMON CARRIER DEFINED.—A common carrier is one who undertakes to carry the goods of all persons indifferently, or of such as choose to employ him, from place to place, by land or water, for reward. (Dwight v. Brewster, 1 Pick. 53.)*

To constitute a common carrier the person must hold himself out to the world as such, and must take all persons or goods offered under such reasonable regulations as he may prescribe. (Fish v. Clark, 49 N. Y. 122.)

Further, the carriage must be for reward, as a gratui-

* "Common Carrier. A person or company whose business it is to transport, for pay, movable property of any one who will hire them. The holding themselves out to carry for any one, and the taking pay for the service, distinguishes common from private carriers." (Abbott, L. Dict.).

"A common carrier is one who makes it a business to transport goods, either by land or water, for hire, and holds himself ready to carry them for all persons who apply and pay the hire." (Fish v. Chapman, 2 Ga. 349.)

tous carriage does not call for extraordinary liability on the part of the carrier, he being simply a mandatary. But the recompense may be expressly stipulated or reasonably implied; and slight circumstances will suffice to raise the implication that the carriage is to be for reward. (Pierce v. Railroad Co.., 23 Wis. 387.) In this case an express company returning empty packages without charge was held to be doing it for reward, as the return of the package was paid for and incident to the first shipment.

It is the general undertaking to transport for the public that fixes the character of the employment as that of a carrier, and not the particular name he may assume. Thus, forwarding express companies are carriers. (Buckland v. Adams Ex. Co., 97 Mass. 124; 15 Minn. 124.) So the carriage may be by any sort of conveyance, on land or water, and be from place to place, or from different points in the same town. (Schouler, Bail., Sec. 322.) And the courts take judicial notice of the fact that certain agencies usually engaged in the transportation of goods are common carriers. (Hutchinson, Carriers, Sec. 73.)

Sec. 717. SPECIAL AGENCIES DEEMED COMMON CARRIERS.—Teamsters, draymen and porters, whose usual business is to carry goods from place to place, or from one point in a town to another for hire, are common carriers. (Fish v. Chapman, supra; Browne, Bail. 92.) So are proprietors of stage coaches. (Jones v. Voorheers, 10 Ohio, 145.) Railroad companies are common carriers, and this though their charter and the general statutes under which they

are organized are silent on the point. Some authorities make an exception in the case of the carriage of live stock, holding that the railroad is not a common carrier in such case. And where the company merely furnishes the motive power and use of roadbed it is not a common carrier. (Railroad Co. v. Whittle, 27 Ga. 535; 20 Ill. 624; Hannibal Ry. Co. v. Swift, 12 Wall. 262.)

The masters and owners of vessels, canal boatmen and ferrymen are common carriers.* Expressmen by the weight of authority are common carriers, but some cases hold that they are not.** Dispatch and fast freight companies are common carriers.*** Warehousemen are common carriers when their business as warehousemen is only incidental to the contract for transportation in which they are agents for the transporting company, but the goods must have been delivered for immediate shipment, and not for storage purposes. (Rodgers v. Wheeler, 52 N. Y. 262.)

The proprietors of elevators for passengers in hotels

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*Citizens' Bank v. Steamboat Co., 2 Story, 16; Wyckoff v. Ferry Co., 52 N. Y. 32. But where the owner takes the property into his control, or holds the horse or other animal being transported by a ferryman, he becomes the agent of the carrier, and some cases hold that he makes the ferryman responsible for his negligence, but the better rule seems to be that if such property is lost by the carelessness or negligence of the owner, the carrier is not liable. (Wislon v. Hamilton, 4 Ohio St. 72; Harvey v. Rose, 26 Ark. 3.)

**Parmalle v. Lowitz, 74 Ill. 116; Christenson v. Am. Ex. Co., 15 Minn. 270; Buckland v. Adams Ex. Co. supra; 5 Am. L. Reg. n. s. 1.

***Merchants Des. Co. v. Bloch, 86 Tenn. 392.

and buildings are common carriers. (Goodsell v. Taylor, 41 Minn. 207; Treadwell v. Whittier, 80 Cal. 584.)

Sec. 718. AGENCIES NOT COMMON CARRIERS.—Steam tow-boats are not common carriers, nor are barge owners who rent or let their barges on special contracts to one person for the trip. (Hays v. Miller, 77 Pa. St. 238; Arctic Fire Ins. Co. v. Austin; 60 N. Y. 470.)

Sleeping car companies are not common carriers or innkeepers, and are liable for losses of the passenger's effects only when they are negligent. (Pullman v. Smith, 73 Ill. 360; Pullman Car Co. v. Gavin, 93 Tenn. 53.) So log driving and booming companies are not common carriers (Mann v. White River Co., 46 Mich. 38), nor are telegraph, or telephone, or bridge companies. (Birney v. Tel. Co., 18 Md. 341; Browne, Bail. 93.) Persons aiding in transportation, as canal companies who rent the use of the canal, but have no control of the actual transportation, are not deemed common carriers. (Penn Can. Co. v. Burd, 90 Pa. St. 281.)

Sec. 719. WHEN THE CARRIER'S OBLIGATION BEGINS.—The carrier becomes liable to the shipper as such, as soon as the goods are delivered for transportation. The delivery must be complete, and intended for as speedy transportation as the business of the shipper will permit. Hence, if the goods are put in the company's warehouse to be shipped at a later time, the relation of warehouseman, and not of carrier, is the result; but if the goods are given to the carrier for shipment, he is liable as a carrier though they are not ship-

ped for several weeks. (London, Etc., F. Ins. Co. v. Rome, Etc., R. R. Co., 144 N. Y. 200.)

Sec. 720. THE DELIVERY.—The delivery to the carrier of goods or property for shipment may be formal or constructive, but there must be a delivery and acceptance of the goods. Where by a custom or usage the shipper has been allowed to place the goods on the platform at the station, such delivery is sufficient to bind the carrier, but in the absence of such a custom it is held that the placing of an article on the platform will not charge the company for any injury to it while there and before shipment. (Grosvenor v. N. Y. Cent. Ry. Co., 39 N. Y. 34; Louisville R. Co. v. Flanagan, 113 Ind. 488.) Delivery to the driver of an express wagon collecting goods is a good delivery to the company, but a delivery to the clerk outside the express office was held not to be a good delivery. (Browne Bail. 101.)

Sec. 721. RIGHTS AND DUTIES OF THE CARRIER IN RECEIVING GOODS.—The carrier is bound to receive and carry goods for all alike, and must not discriminate against shippers. He becomes liable for refusing to carry suitable property and may be compelled to receive and ship such property as he usually transports. (Fish v. Chapman, 2 Ga. 349.) But as a rule he is not obliged to carry all kinds or descriptions of goods, but is only bound to accept such as he usually transports, or holds himself out to the public as ready and willing to transport. Further, the goods should be such as he can carry in his ordinary vehicles, and he may refuse to accept them when, because of

heavy shipments, he has more goods on hand than he can handle. So he may refuse to receive goods unless securely packed, and reject those which are dangerous or offensive or threatened with destruction from a mob or by fire. (Browne on Bailments, 97, and cases cited.) Nor is the carrier obliged to accept goods for delivery beyond his own terminus (People v. Chicago, Etc., Ry., 55 Ill. 95), unless the carrier also operates on the connecting road. (Erie Ry. Co. v. Wilcox, 84 Ill. 239.) It is the general practice for carriers to do so, however.

Sec. 722. THE COMMON CARRIER'S LIABILITY, AN INSURER.—At common law, and by present law, unless relieved by special contract, the common carrier is held responsible for all losses to the goods accepted by him for shipment to any extent, unless such loss was caused by act of God, or the public enemy. Hence he is said to be an insurer of the goods he transports, but the term "insurer" is not exact in this connection, since an insurer in the common acceptation of the word makes good the very losses from which the carrier is exempted. But it is strictly correct to state that the responsibility of the common carrier approaches more nearly to that of the insurer than any other class of bailees.*

* "The common carrier of goods, having accepted them for carriage, is bound, in the absence of express contract, to forward them with reasonable dispatch to their destination or to the end of his route; and, on arrival at the destination, to deliver them to the consignee or give him reasonable notice of their arrival; or, if the destination is beyond the end of his route, to deliver them to a connecting carrier; and he is liable not only for the negligence of himself and his servants in these re-

The carrier's extreme responsibility is required by law as a result of his vocation, which allows him to handle goods of persons who are, in the nature of the case, entirely unacquainted with him personally, and his opportunities for appropriating the property of the shipper are so numerous that it has become the settled policy of the law to hold him to exceptional care in order to prevent fraud or wrongdoing in regard to the property of shippers who are unable to otherwise protect themselves.*

Sec. 723. SAME SUBJECT—ACT OF GOD CONSIDERED.—"Act of God," "Vis Major," or "inevitable accident," as it is variously called, is "such irresistible disaster as results immediately from natural causes, and is in no way attributable to human agency." (Story on Bailments, Sec. 25.) Common examples of what are termed acts of God are, tempests, earthquakes, floods, lightning, and the like. Loss arising from these causes is not charged to the carrier. (Nugent v. Smith, 1 C. P. Div. 19; Long v. Penn. Ry. Co., 147 Pa. St. 343.) Sudden frosts, and snows and blizzards are also considered to be the result of inevitable accident which exempt the carrier from loss arising therefrom. (Bal-

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spects, but he is responsible for the safety and good condition of the goods, like an insurer, against all casualties, injuries and loss, except those which occur through the act of God or inevitable accident, the public enemies, the nature and qualities of the goods themselves, the conduct of the shipper, or the act or mandate of the public authorities. (Browne, Bailments, 105.)

*Coggs v. Bernard, 2 Ld. Raym. 909; Fish v. Chapman, 2 Ga. 349; Daggett v. Shaw, 3 Mo. 264; Welsh v. Pittsburg, Etc., Ry. Co., 10 Ohio St. 65, Adams Ex. Co. v. Darnell, 31 Ind. 20; Wood v. Crocker, 18 Wis. 345.

lentine v. No. Mis. Co., 40 Mo. 491; Bowman v. Teall, 23 Wend. 306.)

But unavoidable accidents by fire, explosions, collisions, and the like, are deemed to be the result of human agency for which the carrier is not excused from liability for losses so occurring. (Chicago, Etc., Ry. Co. v. Sawyer, 69 Ill. 285; Gilmore v. Carman, 1 S. & M. 279.) Fire caused by spontaneous combustion or lightning, is considered inevitable accident, and excuses the carrier. The "act of God" is explained to be something in opposition to the act of man. (Forward v. Pittard, 1 Term, 33.) Human agency must not occur, whether of the carrier or of a third person, if the loss is to be considered as the result of inevitable accident.*

*Browne, Eng. Rul. Cas. 218, and cases cited, under Nugent v. Smith.

Obstructions in navigable rivers or waters causing loss, if unknown to man, as rocks and shoals, are classed as inevitable accidents, but if it is a known rock, or any obstruction caused by human agency, as the mast of a sunken ship, or a sunken log in a river, the carrier is held responsible for the loss. (Merritt v. Earle, 29 N. Y. 115; Steele v. McTyer's Admrs., 31 Ala. 667.

But where goods are thrown overboard in a violent storm to save the ship, such loss will not be charged to the carrier. (Price v. Hartshorn, 44 N. Y. 94.)

The "Vis Major," to excuse the carrier, must be the immediate and proximate cause of the disaster. Proximate cause is a perplexing question. In Railroad Co. v. Fries, 87 Pa. St. 234, where a fire from the woods was carried by a tornado to the cars of the company and the goods of a shipper destroyed, the tornado was held to be the proximate cause of the fire and the carrier was excused from liability for the loss. But in Miller v Stern, 10 N. Y. 431, where the circumstances were almost identical, the carrier was not excused from liability for the loss. So, even where the act of God is the proximate

When the carrier has shown that the loss was caused by some Vis Major, the burden of proof rests upon the shipper to show that the loss was the result of the carrier's negligence. But in the first instance the carrier must always show some exempting cause. (Union Ex. Co. v. Graham, 26 Ohio St. 595.)

Sec. 724. SAME SUBJECT—PUBLIC ENEMIES CONSIDERED.—Public enemies, as the term is used in this connection, means those with whom the State or nation of the carrier is at open war. But it is not necessary that there should have been a declaration of war, the actual commencement of hostilities will suffice. Indian tribes in a state of war are public enemies, so are pirates, and privateers. (Express Co. v. Kountze, 8 Wall. 342.) And now, contrary to the old

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cause, the carrier must be free from contributory negligence, or he will be responsible. He must use due care in securing and protecting the goods when overtaken by a disaster, and if any way he could have saved them, he will be liable if they are lost. So the carrier may take no extra hazards as by departing from the usual route taken by the vessel, and where he does so he will be responsible though the loss occurs from inevitable accident. (Crosby v. Fitch, 12 Conn. 410; Phil., Etc., Ry. Co. v. Beck, 125 Pa. St. 620.)

Where the loss occurs by the carrier's unreasonable delay in shipment, he is held liable for loss afterward occuring, though arising from Vis Major; this is the New York rule, and prevails in a number of States. (30 N. Y. 564.) But in other States, negligence of the carrier in delaying the shipments does not make him responsible for loss by inevitable accident. (Denny v. Ry. Co., 13 Gray, 481; Daniels v. Ballantine, 23 Ohio St. 532.) In the Ohio case the storm was said to be the proximate cause and the delay only the remote cause of the accident. See Browne, Bailments, 109, and note to 97 Am. Dec. 409.

rule, delay caused by mobs, rioters, strikers, etc., beyond the power of the carrier or the civil authorities to control, will excuse the carrier. But he may not excuse delivery on account of mobs, strikes and the like, as this would give an opportunity for fraud through complicity with the parties causing the delay.*

Sec. 725. SAME SUBJECT—SPECIAL EXCUSES FOR THE CARRIER.—The carrier may show that the loss occurred through hidden defects or vice in the articles shipped, or from their being insecurely packed or marked, and thus excuse himself from liability. So any fault on the part of the shipper, as bad faith or fraud in giving goods in one class of freight when they should belong to another, may relieve the carrier.** And where the shipper selects the vehicle, as an open car, he will relieve the carrier from losses arising from understood defects in the car selected. (Browne, Bailments, 113, and cases cited.)

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*State v. Moore, 74 Mo. 413; Gulf, Etc., Ry. Co. v. Levi, 76 Texas, 337; Geismer v. Lake Shore, Etc., Ry. Co., 102 N. Y. 563.

The rule seems to be that rioters, mobs, strikers, and the like are considered public enemies to excuse delay on the part of the carrier, but not to excuse delivery. (Mis. Pac. Ry. Co. v. Nevill, 30 S. W. Rep. 425.)

**Am. Ex. Co. v. Smith, 33 Ohio St. 511; Beard v. Ill. Cent. Ry., 79 Ia. 518; Schouler, Bailments, Sec. 397. Thus loss of perishable fruits, injury to animals from their own natural or vicious propensities, etc., do not charge the carrier who has not been remiss in his duty in the transportation of them. But one receiving live stock for transportation is bound to provide suitable vehicles for them, and to feed and water them on the way. (Covington Stock Yards Co. v. Keith, 139 U. S. 128.) This duty may be required by statute also.

When the goods are taken from the carrier by a judicial process he is relieved from liability for failure to deliver, if the proceeding on which they are taken is regular and valid or the goods are the property of the person thus seizing them. And where the goods are taken into the custody of the law without the fault or connivance of the carrier, he is excused for delay or non-delivery, but should give immediate notice to the shipper. A wrongful attachment or other seizure by an officer of goods in the hands of a carrier, is held not to excuse the carrier from liability to the owner; he must resist such wrongful taking, as the proceeding being invalid it is mere robbery. This seemingly harsh rule is modified in some cases through the ruling that if the writ by which the goods are taken is regular on its face, the carrier is excused for surrendering the property to the officer.*

The carrier is not obliged to accept goods for transportation beyond his own line, but he may do so and thus become responsible as a common carrier for the whole distance. By special contract he may limit his liability to his own line and delivery to the connecting carrier. Whether accepting goods marked to places beyond his lines binds the carrier for their delivery there, is in dispute. In England the acceptance makes a contract for through transportation; in America the rule is just the reverse, and it is but a contract to deliver to the next carrier. (Browne, Bailments, 114-5; El-

*Edwards v. White, Etc., Co., 104 Mass. 159; Jewett v. Olson, 18 Oreg. 419; Gibbons v. Farwell, 63 Mich. 344; Bennett v. Am. Ex. Co., 83 Me. 236.

more v. Ry. Co., 23 Conn. 457.) In a few States the English rule prevails. (Mobile, Etc., Ry. Co. v. Copeland, 63 Ala. 219.)

Sec. 726. LIMITATION OF LIABILITY BY SPECIAL CONTRACT.—It is now well settled in this country that a common carrier may limit his common law liability by special contract with the owner or shipper. (N. J. Steam Nav. Co. v. Bank, 6 How. 344; Camden, Etc., Ry. Co. v. Bauldauf, 16 Pa. St. 67; Davidson v. Graham, 2 Ohio St. 131.) But the carrier may not by such a contract exempt himself from liability for the misfeasance or gross negligence of himself or his servants, and by the weight of authority he is liable, notwithstanding such contract, for the lack of ordinary care.*

The carrier cannot under any circumstances exempt himself from any and all losses and negligence; where

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*Davidson v. Graham, supra; Railroad Co. v. Curran, 19 Ohio St. 1; Ex. Co. v. Sands, 55 Pa. St. 140; Railroad v. Lockwood, 17 Wall. 357; Erie Ry. Co. v. Wilcox, 84 Ill. 239. In Ohio he is in any case held to a greater degree of diligence than the ordinary bailee for hire, because of his public employment. (Welsh v. Pittsburg, Etc., Ry. Co., 10 Ohio St. 65.)

In Railroad v. Lockwood, supra, decided in 1873, the Supreme Court held that a railroad company could not exempt itself by special contract from liability for the negligence of its officers or agents, and further, that this negligence was not confined to gross negligence, and that such stipulations were regarded as unreasonable in law. In New York and a few other States it is held the carrier may exempt itself from the negligence of its servants or employes, but not from gross or willful negligence. (Hutchinson, Carriers, 261.) So if the carriage is gratuitous the carrier may contract against any but gross or criminal negligence. (67 Wis. 66.)

the carriage is for hire he is responsible for negligence of himself or servants, regardless of the special contract; if the carriage is gratuitous he may stipulate against all but gross negligence. See cases to preceding note.

A carrier may limit his liability in advance of loss, to a reasonable sum (Hill v. Railroad Co., 114 Mass. 284), so he may stipulate that a claim for loss must be made within a stated time after the default, as 30 days. (Express Co. v. Caldwell, 21 Wall. 264.) And he may limit his liability to a sum certain, unless the value of the article is declared and a higher rate of freight paid. (Cole v. Goodwin, 19 Wend. 251; Pac. Ex. Co. v. Foley, 46 Kans. 457.)

Sec. 727. SAME SUBJECT—LIMITATION BY PUBLIC NOTICE.—As a rule in this country the common carrier cannot limit his liability by a public or general notice, as by advertising or printing on his cards, "All baggage at the risk of the owner." (Fish v. Chapman, 2 Ga. 349; Jones v. Voorhees, 10 Ohio, 145.) The carrier is still liable, though the notice was actually given the shipper, because he is bound to accept goods such as he usually carries, and to transport them under the responsibility which the law imposes upon him, and the owner is never presumed to assent to a general notice which relieves the carrier from such responsibility.*

But the carrier may, by a general notice brought home to the shipper, limit his responsibility to the line

*Jones v. Voorhees, supra; Hollister v. Nowlen, 19 Wend. 112; So. Ex. Co. v. Caperton, 44 Ala. 101.

of his general business, and to require the shipper to state the kind and quality of the goods, give notice of loss within a reasonable time, and the like. But such notices are strictly construed.*

Sec. 728. SAME SUBJECT—BY ACCEPTANCE OF CARRIER'S RECEIPT BY SHIPPER.—The acceptance of a carrier's receipt or bill of lading containing stipulations makes a contract between the shipper and carrier according to its terms. In some States it is held that such contract does not bind the shipper unless its terms were made known to him and assented to by him. But the more general rule seems to be that if there was no fraud practiced upon the shipper, the receipt is binding, though not read by him.**

As a rule the carrier must exempt himself by a special contract or agreement with the shipper, verbal or written, express or implied, if his common law liability is to be modified. And such contracts can only extend to losses which result independent of any negligence or omission of duty on the part of the carrier or his employes. See Railroad Co. v. Barrett, 36 Ohio St. 449.

The carrier's agreement with the shipper is construed

*Bank v. Brown, 9 Wend. 85; U. S. Ex. Co. v. Backman, 28 Ohio. St. 144. In this latter case the express company was held liable notwithstanding the printed contract limited the amount of recovery, to the full extent of the loss by its negligence, and this though a less rate was charged on account of the limitation of the liability.

**U. S. Ex. Co. v. Backman, supra; Grace v. Adams, 100 Mass. 505; Kirkland v. Dinsmore, 62 N. Y. 171. Acceptance of a receipt, with unsigned general notice on the back, was held not to bind the shipper in Railroad Co. v. Manfg. Co., 16 Wall. 318.

strictly, the presumption being that the common law liability continues, and any limitation must be by special contract; such contract may be verbal or written, but its terms must be unambiguous, and if printed or written it should be plain and easily legible.*

Sec. 729. STATUTES EFFECTING CARRIERS. —Carriers engaged in interstate commerce are subject to two jurisdictions, or correlated sovereignties,—the State and the United States. Congress, under its powers to regulate commerce, has passed various statutes in regard to interstate carriers, prescribing their duties in certain cases, and protecting the shipper from any unjust discriminations that the carrier might make with special shippers. These laws come under the head of interstate commerce regulations, and their enforcement is supposed to be secured by the Interstate Commerce Commission, established in 1887, and given power to punish infringements and evasions of the law.**

State statutes or laws also consider railroads as public highways and subject to legislative control. It is held that State Legislatures have power to prescribe rates

*Railroad Co. v. Barrett, supra; Blossom v. Dodd, 43 N. Y. 264; Camden Ry. Co. v. Baldauf, 16 Pa. St. 67; Rosenfeld v. Peoria, Etc., Ry. Co., 103 Ind. 121. In the New York case the stipulations of the contract were in very fine print, and the court held that the shipper was not bound by them; in the Pennsylvania case, the shipper was a German and could not read the contract, and he was held not to be bound unless it was interpreted to him. And the shipper would not be bound if the limitation was printed on the back of the receipt and not brought home to him.

**See this subject discussed in No. 2 Home Law School Series, Secs. 141-150.

of freight within reasonable limits as a proper exercise of their police power, and they may determine what is a reasonable rate for the transportation of both freight and passengers, and if the limit it properly fixed, and does not require the carrier to transport at a loss or without reasonable profit, it is for the Legislature and not for the courts to alter such limit. (Munn v. Illinois, 94 U. S. 113.) In some States the carrier is forbidden to contract for exemption from liability in certain cases. But such laws are construed to allow the carrier the benefit of any insurance on the goods by the shipper.*

Sec. 730. CONNECTING CARRIERS.—A connecting carrier is one who receives the goods from another carrier, and not immediately from the shipper. Any corporation acting as a carrier has power to contract to carry beyond its own terminus, and such a con-

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*British, Etc., Ins. Co. v. Gulf, Etc., Ry. Co., 63 Tex. 475. It may be said in this connection that nowhere in the realm of law-making is the influence of corporate wealth more palpably apparent than in the statutes in regard to railway companies. When the right of the legislature to limit and regulate their actions is unquestioned, we frequently find that the only legislative action taken is to confer more privileges on these corporations. And where, as is sometimes the case, the legislature has endeavored to defend the general public from these grasping and unscrupulous corporations, the courts usually undo or nullify their action by claiming it is unconstitutional, on some technical ground, or upon a false and fraudulent showing by the minions of the railroads. With watered stock by the millions on which the shipper is expected to pay interest in excessive rates the people can expect little relief from courts that will not look behind the showing of the company and ascertain what amount of capital is really invested in such enterprises as railway, telephone and telegraph companies.

tract is not ultra vires, or beyond the scope of its powers. We have seen that the law does not require the carrier to contract to carry beyond his own line, and where the goods are marked to a point beyond his terminus he may limit his liability to losses arising on his own road. He may make a contract for through carriage, and is then bound to transport the goods to their destination, and is responsible as a carrier for losses by the connecting carrier. In this country, contrary to the English rule, the contract does not arise from the mere acceptance of goods marked to a point beyond the carrier's lines, but there should be an express contract for through shipment. If there is no express contract only the carrier in default is liable, and the receiving carrier is excused upon delivery to the connecting carrier. When there is a contract for through carriage and loss occurs, the shipper may elect which carrier he will hold responsible, and the connecting carrier in such case can claim the benefit of the exemptions and limitations in the bill of lading. Otherwise, if the contract is not for through carriage. (Railroad Co. v. Androscoggin Mills, *22* Wall. 594; Babcock v. L. S. Ry. Co., 49 N. Y. 491.)

The receiving carrier transporting over his own lines and delivering to a connecting carrier should furnish all instructions given him by the shipper in regard to the goods to such connecting carrier, or he will be held responsible for losses arising by reason of his failure to do so. (Little Miami R. Co. v. Washburn, *22* Ohio St. 324.)

Sec. 731. THE CARRIER'S DUTY IN TRANSPORTATION.—The carrier must provide all reasonable and necessary facilities to the public required to carry on the undertaking which he assumes. He is to forward goods of all impartially, in the order of their receipt for shipment, except that he may give the preference to perishable goods, as fruits, but he should not receive perishable goods for shipment if by so doing he delays the shipment of other goods already on hand. (Railroad Co. v. Burrows, 33 Mich. 6; Railroad Co. v. Burns, 60 Ill. 285.) The carrier should provide adequate cars for the handling of such varieties of freight as may ordinarily be expected to seek transportation on his route. (Northern Belle, 9 Wall. 526.) And must furnish refrigerator cars for such articles as butter, if he accepts them for shipment. (Beard v. Ill. Cent. Ry. Co., 79 Ia. 518.) So a carrier must use such improved machinery as is used by practical men, as a spark arrester, but he is not compelled to adopt unused and untried inventions or methods of transportation. (Levering v. Trans Co., 42 Mo. 88.)

The goods should be carried by the carrier's customary route, or he becomes liable for all losses, so, where there are two routes and one is more dangerous than the other, he takes the more perilous one at the risk of being held for any loss.* In marine transportation general merchandise must be stored in the hold of the vessel and inflammable goods or live stock on

*Smith v. Whitman, 13 Mo. 352; Merch. Des. T. Co. v. Kahn, 76 Ill. 520; Natchez Ins. Co. v. Stanton, 2 S. & M. 340; Crosby v. Fitch, 12 Conn. 410.

deck.* Where goods are marked to indicate their nature, and that care is required in their handling, as "glass, with care," they must be carefully handled or the carrier will be liable.** So where a definite mode of transportation is contracted for by the shipper, it must be strictly complied with by the shipper, and if the contract is for "all rail" transportation, and it is sent part by water, the carrier is responsible for any loss.***

The carrier may deviate from his usual route to avoid danger, or when his own route is obstructed, or to succor the distressed at sea.

The transportation must be completed within a reasonable time, but, as has been seen, the carrier is not an insurer of the prompt delivery of the goods, and may excuse delay on the grounds of stress of weather, low water, or the interference of mobs, riots, strikers and the like. (Ante, Sec. 724.) So the custom and general usage of the carrier will determine whether he should make a personal delivery to the consignee, or simply give notice of the arrival of the goods at their destination. In this respect all that is required of the carrier is reasonable diligence.

The carrier must despatch goods promptly, and while stress of business will excuse him from accepting, it will not, after acceptance, excuse his lack of proper accommodations. (Hutchinson, Carriers, Sec. 292.) Where

*Hutchinson, Carriers, Sec. 309; Harris v. Moody, 30 N. Y. 266.

**Hastings v. Pepper, 11 Pick. 41; Johnson v. N. Y. Cent. T. C., 33 N. Y. 610.

***Railroad Co. v. Beck, 125 Pa. St. 620.

he contracts to deliver within a specified time he will be held to the strict terms of the contract, and absolute impossibility will not excuse him, though there are exceptions to this rule. In case accident befalls the goods in shipment from a cause for which the carrier is not responsible, he must use all diligence to protect and preserve them, or he will nevertheless become liable.

Sec. 732. WHEN THE DELIVERY IS SUFFICIENT TO RELEASE THE CARRIER.—The receiving carrier who has not contracted for through shipment may relieve himself from further responsibility by delivery to the connecting carrier; as regards the shipper such delivery must be actual, but as regards the connecting carrier a constructive delivery is sufficient. Placing goods on the connecting carrier's side of the depot has been held an actual delivery by the receiving carrier. (95 U. S. 43; See Bancroft v. Merch. D. F. Co., 47 Ia. 262.)

Carriers by coach, wagon and express companies are ordinarily held to deliver to the consignee personally, or at his residence or place of business, other carriers, as by water, at their docks, and railroads at their regular stations. (Browne, Bailments, 130.) The carrier is not required to adopt a different mode of transportation to deliver at consignee's residence, unless such is his custom; when personal delivery is not made the carrier should notify the consignee of the arrival of the goods, and carriers by water must give notice and are liable as carriers until there has been reasonable time to remove the goods. (Shenk v. Pa., Etc., Co., 60 Pa. St. 109; Herman v. Goodrich, 21 Wis. 543.)

Carriers by rail, upon giving the required notice to the consignee, are only liable as carriers for a reasonable period, and if goods are not removed within this time they are regarded as warehousemen and not carriers.*

Reasonable time after notice in which to remove goods is a question of law for the court.

Express companies in the habit of making personal delivery at all important towns must do so where they have delivery wagons, and notice to the consignee of the arrival of the goods is not sufficient to relieve the company of this duty. (99 Mass. 259.) But where the consignee is dead, absent, or refuses to accept the goods, the company holds them as warehousemen, and is not obliged to notify the consignor unless notified that he is still the owner. (44 N. Y. 505.)

Where the goods are sent "C. O. D." the carrier can deliver only upon cash payment, and he is a common carrier of the money returned. The consignee has a right to inspect the goods so sent, and the carrier should permit him to do so. (Lyons & Co. v. Hill & Co., 46 N. H. 49; Daylight Burner Co. v. Odlin, 51 N. H. 56.)

The carrier must deliver to the right person, and this

*McMillan v. Mich., Etc., Ry. Co., 16 Mich. 79; Tarbell v. Royal, Etc., Co., 110 N. Y. 170. But this rule is not uniform in the States, and in a number of States it is held that the responsibility changes to that of a warehouseman as soon as the goods arrive at their destination and have been removed from the cars to the platform. (Mobile, Etc., Ry. Co. v. Prewit, 46 Ala. 63; M. D. T. Co. v. Moore, 88 Ill. 136.) And in some cases the necessity of notice is dispensed with. (Gasheiler v. Wabash Ry. Co., 83 Mo. 112).

he must determine at his peril. A delivery to the true owner will protect him though he is not the consignee, and for failure to so deliver he is responsible as for conversion. (50 N. Y. 213.) So where goods were ordered by a swindler in the name of a fictitious firm, the carrier was held responsible for delivering to the swindler as agent of the firm. But this strict liability to deliver to the right person continues only while the carrier is such, and when he becomes warehouseman he is only required to exercise ordinary care in the delivery of the goods. See note to Browne, Bailments, 141.

Sec. 733. VALID EXCUSES FOR NON-DELIVERY.—The carrier may excuse a failure to deliver the goods to the consignee by showing: 1. That they have been taken from him by judicial process. 2. That they have been delivered to an adverse claimant who is the true owner, but the carrier must at his peril determine correctly who is the rightful owner. (Story, Bailments, Sec. 450; Hutch. on Carriers, 404.) 3. That the consignor had exercised the right of stoppage in transitu. What is meant by this right in the shipper we shall consider in the next section.

Sec. 734. STOPPAGE IN TRANSITU DISCUSSED.—This is explained to be the right which the shipper of goods, who has sold them on credit, has to retake them while in the hands of a carrier being transported to a buyer who has become insolvent. The shipper may give notice, as by telegraph, to the carrier, and this is sufficient to bind him not to deliver. But the carrier must determine at his peril that the consignee is actually insolvent; mere financial embarrassment of the

consignee is not sufficient to authorize the carrier to withhold the goods on notice of the shipper. (Hutch., Carriers, Sec. 421.)

The right of stoppage in transitu continues as long as the goods are in the possession of a middleman, acting as agent for the shipper, whether he is carrier, warehouseman, or other bailee. The right may be defeated by a transfer of the bill of lading by the consignee to a purchaser in good faith, who has no notice of the insolvency and the shipper's intention to reclaim the property. (51 Cal. 345.)

Sec. 735. CARRIER'S RIGHT OVER THE GOODS.—In general the carrier has no right to demand information as to the nature and value of the goods offered for shipment in packages, but he may do so where the goods excite suspicion as being dangerous.

The carrier may insure the goods while in his possession to protect himself, but has no authority to sell them save in great emergency and to prevent total loss. (Am. Ex. Co. v. Smith, 33 Ohio St. 511.)

The carrier has a special property in the goods, and under this right he may maintain replevin or other action, concurrent with the owner, necessary to regain or retain possession against trespassers or those who injure the goods. But where the owner chooses to bring his action first the carrier is barred from bringing suit. (28 Vt. 268.)

Sec. 736. THE CARRIER'S LIEN FOR FREIGHT OR ADVANCES.—A common carrier

has a right to his reasonable charges for the transportation, and may retain the goods until such charges, or any advances made by him, are paid. The advances by the carrier are usually made in the payment of freight to connecting carriers. The right of the carrier to a lien is generally recognized, but he may waive the right by special contract. (Bowman v. Hilton, 11 Ohio, 303.) The lien is simply a remedy to enable him to enforce payment of freight, in addition to the other remedies given for the collection of a debt, and is some recompense for the burdens imposed upon him by law.*

In its nature the carrier's lien is special, that is, it attaches only to the particular goods in regard to which the charges or advances were made. And goods may not be held to enforce payment of a general balance due the carrier. Though he may retain a portion of a shipment of goods as security for all the freight due

*The shipper is primarily liable for the payment of the freight, and the consignee may also become liable by agreement, or where the bill of lading recites that he is to receive the goods on payment of the freight, and he accepts the goods, he becomes liable, but in this case the consignor is still liable. Where a carrier contracts to carry goods to a particular place and to safely deliver them, and the goods are lost through negligence or are delivered to the wrong person, the carrier can recover no freight. So where the carrier demands an unreasonable amount for his charges, the owner may tender a reasonable amount of freight, and on failure of the carrier to deliver, sue for the goods or their value. In general, where the carrier fails to deliver the goods for any reason, including the act of God, he is not entitled to compensation for the carriage. But where the goods are interrupted on the journey, intercepted and accepted by the owner, or sold in transit to prevent loss, the carrier is entitled to a pro rata payment of freight. (Hunt v. Haskell, 24 Me. 339.)

upon the shipment. The lien may be waived or lost by relinquishing the possession voluntarily. (Norfolk, Etc., R. Co. v. Barnes, 104 N. C. 25; Browne, Bail., 144-5.)

The carrier's lien prevails as against general creditors of the owners of the goods (Newhall v. Vargas, 15 Me. 314), and as against the right of stoppage in transitu. (Potts v. N. Y., Etc., R. Co., 131 Mass. 155.) The lien is assignable, but does not pass with a wrongful sale or pledge of the goods. (Everett v. Coffin, 6 Wend. 603; Everett v. Saltus, 15 Wend. 474.) A carrier has no lien as against the owner for freight on goods shipped by one having no title or interest in them. (Pingree v. Detroit, R. Co., 66 Mich. 143; 8 Gray, 261.)

The carrier's common law lien is merely a right to retain; unlike a pledgee, he has no power to sell for his charges, and if he does so it is considered a conversion. (Briggs v. Boston, R. Co., 6 Allen, 246.) He must foreclose in equity. But by statute in many States he is given the power to sell at public auction after public notice. (Nathan v. Shivers, 71 Ala. 117.)

Sec. 737. CARRIERS OF LIVE STOCK.—In some States, as Michigan, carriers of live stock are not considered common carriers. (25 Mich. 229.) But by the weight of authority carriers of animals are common carriers, and subject to the same responsibilities, save as modified by the nature of the things being shipped. (98 Mass. 239.) In case of accident or loss the carrier may show that the injury arose from the vice or propensities of the stock, and not from any carelessness on his part.

Sec. 738. CARRIERS OF PASSENGERS CONSIDERED.—A carrier of passengers is not held to the same degree of accountability as a carrier of goods, as the passenger is supposed able to care for himself to some extent, and, further, the carrier has not the same right of control as over goods. Hence his liability is not to carry safely save the act of God or the public enemy, but rather to use the highest degree of vigilance and all care and diligence and skill which prudent persons under similar circumstances would do to avoid accident. He is excused from liability for injury to a passenger where the negligence of the passenger exclusively, or together with that of the carrier, caused the injury.*

The carrier is bound to receive and transport all orderly persons who are ready and willing to pay the required fare. But the company may prescribe reasonable conditions for the admission of passengers on way-

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*Railroad Co. v. Roy, 102 U. S. 456; Treadwell v. Whittier, 80 Cal. 575; Spellman v. Lincoln Rap. T. Co., 36 Neb. 890.

Browne thus states the rule of liability for passenger carriers: "The contract of a railway company as carrier of passengers is to use due (extending to a high degree of) care, including the duty of exercising vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. The duty applies to the construction and maintenance as well of the lines as of the carriages; and in the case where the company contract to carry over a line other than their own, extends to that other line. But it does not amount to a warranty of safe carriage, nor does it make the company liable for damage by an occurrence which could not be prevented by the use of skill and foresight." (5 Eng. Rul. Cases, under Great West. Ry. Co. v. Blake, also given in Browne, Bail. 153.)

freight or other trains that do not ordinarily carry passengers, and these regulations must be followed by persons wishing to be carried. (Hollister v. Nowlen, 19 Wend. 234.)

The relation of carrier and passenger arises whenever a person is received for carriage in any vehicle propelled by the carrier's machinery, and forming a portion of the train. Thus, passengers on parlor cars or sleeping cars are in the care of the railway company, though an independent company may also be liable for their care. (Railroad Co. v. Walrath, 38 Ohio St. 461; Browne, Bailments, 149.) The payment of fare is not necessary to constitute one a passenger, and government mail agents, express messengers and persons riding free on a drover's pass are deemed passengers. (Browne, Bail., 150, and cases cited.) But a mere trespasser or interloper can only charge the carrier with ordinary care and to refrain from intentional injury. (Higley v. Gilmer, 3Mont. 90.)

Sec. 739. CARRIER'S RIGHT TO EJECT A PASSENGER.—By disorderly conduct, drunkenness, refusal to pay fare, or by losing his ticket and refusing to pay again, a passenger may forfeit his right to ride on the train or other vehicle of the carrier, and may be ejected by the conductor. But the putting off must be done with prudence and care, or the carrier becomes responsible for injury occurring. So where the passenger is put off for misconduct after having paid his fare, the pro rata amount of his ticket unused must be

returned to him.* Excursion or cut-rate tickets, sold upon time limit or for use only on certain trains, must be used according to their conditions, and the passenger cannot ride on trains other than those specified, or after the time has expired. (Powell v. Railroad Co., 25 Ohio St. 70.)

Sec. 740. MAY NOT EXCUSE HIS OWN NEGLIGENCE BY CONTRACT.—Public policy demands of the carrier of passengers that he shall exercise due care and skill and all possible vigilance to protect the passengers from injury, and hence, as in the case of a carrier of goods, forbids him to limit his liability for such care, by contract with the passenger. He may not contract against the consequences of his own or his employes' negligence, and such a contract will not relieve or excuse him from liability. (Steam Co. v. Insurance Co., 129 U. S. 397; Harris v. Howe, 74 Tex. 534.) But a carrier selling a ticket to a point beyond its own lines may insert a valid condition that it will not be liable beyond its own terminus. (Harris v. Howe, supra.)

The carrier of passengers, as well as of freight, may contract to carry beyond its own lines and into other States, and the connecting carrier, by accepting such contract, becomes the agent of the carrier receiving the passenger, and makes the receiving carrier liable for its

*Pittsburg, Etc., Ry. Co. v. Nuzum, 50 Ind. 141; Railroad Co. v. Hassell, 62 Tex. 256; McClure v. Phila. Ry. Co., 34 Md. 532; Railroad Co. v. Gants, 38 Kan. 608; Higgins v. Watervliet T. Co., 46 N. Y. 23; Arnold v. Penn. Ry. Co., 115 Pa. St. 135; Railroad Co. v. Gastka, 128 Ill. 613.

negligence, unless the contract stipulates otherwise, or the receiving carrier issues the through ticket as the agent of the connecting carrier.

It is in dispute whether a carrier may limit his liability for negligence of himself or employes when the carriage is nominally gratuitous, the better opinion, and the one founded in reason, holds such limitations void, but the New York cases allow a carrier transporting a passenger free, for the purpose of caring for property of which he is the shipper, to limit its liability for negligence.*

As regards a passenger carried absolutely free, the carrier may stipulate that he will not be liable for negligence of himself or servants. (Kinney v. Ry. Co., 34 N. J. 513; Quimby v. Railroad Co., 150 Mass. 365; contra, Jacobus v. St. Paul, Etc., R. Co., 20 Minn. 125.)

Sec. 741. LIABILITY FOR PASSENGER'S BAGGAGE.—The carrier is bound to deliver the baggage of a person at the end of the journey, unless destroyed by inevitable accident or the public enemy, and a delivery to the wrong person on a forged order will not excuse him. His responsibility remains for the passenger's baggage, though no distinct price be paid for its carriage. Any special agreement limiting this responsibility must be established by the carrier in the same manner as for the reduction of liability in freight cases. And a mere notice of the limitation of liability

*Railroad Co. v. Lockwood, 17 Wall. 357; Ohio & Miss. Ry. Co. v. Selby, 47 Ind. 471; Poucher v. N. Y. Cent. R. Co., 49 N. Y. 263.

printed on the ticket or check, not seen or acquiesced in by the passenger, will not exempt the carrier from his common law liability. Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 647.)

By baggage, or luggage, as the English term it, is meant that ordinary and reasonable wardrobe for one in the passenger's station of life, together with such articles as are usually carried for personal convenience, comfort, or instruction and protection. It may include jewelry worn by the passenger and placed with the wardrobe, but not money carried for purposes unconnected with the expenses of the journey. (Bank v. Railroad Co., 20 Ohio St. 260; Jones v. Voorhees, 10 Ohio, 145.) By special contract the carrier becomes liable for merchandise or other articles of the passenger transported as baggage, but the mere acceptance of baggage without knowledge of its contents does not bind the carrier for merchandise. (Railroad Co. v. Carrow, 73 Ill. 348; Blumantle v. Railroad Co., 127 Mass. 322.)

For articles left on the train which were in the possession of the passenger, the carrier is only a gratuitous bailee, and not responsible for their loss. The destination having been reached, it is the duty of the passenger to call promptly for his baggage or the carrier becomes responsible for its care simply as a warehouseman. (Penn. Co. v. Miller & Co., 35 Ohio St. 541.) While passengers are usually made pay in advance, the carrier is given a lien on any baggage belonging to the passenger for his fare or passage money, but the lien

does not extend, as was held in some early English cases, to the clothes on the person of the passenger.

Sec. 742. LIABILITY FOR NEGLIGENCE.—In general the plaintiff must show that the carrier is guilty of some legal fault, or has not used reasonable care or due diligence under the circumstances. The general rule being that negligence must be proved and is never presumed, but the circumstances may give rise to a presumption of negligence. Where the passenger is injured by a breaking of the conveyance or vehicle, a prima facie case of negligence is made out, the carrier may then show in defense that human foresight and prudence could not have prevented the accident. Where the accident was caused by a latent defect the carrier is excused. The negligence of the manufacturer of a car or the builder of a bridge is imputed to the carrier. And the duty of the carrier to use due care is not confined to the running of the train, but he is held equally responsible for negligence in regard to the management of the stations. The railway companies are bound to keep their grounds and approaches and platforms in a safe condition, and are liable for failure in respect to this duty if injury occurs to a passenger. But negligence on the part of the passenger contributing to the injury forfeits his right to recover.

It is the carrier's duty to protect the passenger from assaults or insults from his servants or fellow-passengers. But it is held that he is not liable where the injury from such cause could not reasonably have been anticipated. But the fact that the servant of the carrier

acted maliciously and against instructions will not excuse the carrier.*

IV Telegraph and Telephone Companies.

Sec. 743. TELEGRAPH COMPANIES NOT COMMON CARRIERS.—Telegraph and telephone companies are not common carriers, though the first few cases regarding them sought to hold them liable as such.**

They are now regarded as quasi-public servants, bound to serve the public without discrimination, and held responsible as bailees for hire and not as common carriers. (Manville v. Western U. Tel. Co., 37 Ia. 214; Western U. Tel. Co. v. Adams, 75 Tex. 531.)

They are held responsible for losses arising from failure to observe the most exact degree of care and skill, or for the least negligence. As public servants their duty is to receive messages indifferently from all who are willing to pay for the service, and to transmit such messages accurately and deliver them with promptness to the proper person. (113 Mass. 299.) But they need not furnish stock quotations to "bucket-shops," or send messages on Sunday, save those which

*The scope of the present work, and the limited number of pages in which this subject has to be presented have made it necessary for the author to put these general principles in one paragraph and refrain from citing the numerous authorities which sustain each proposition. In other numbers of the Home Law School series this subject will be again considered at greater length.

**Birney v. N. Y., Etc., Tel. Co., 18 Md. 341; Leonard v. N. Y., Etc., Tel. Co., 41 N. Y. 544. In Parks v. Alta Cal. Tel. Co., 13 Cal. 422, and Western U. Tel. Co. v. Buchanan, 35 Ind 440, they were held to be common carriers.

are regarded as a necessity. (84 Ky. 664; 118 Ind. 248.)

Such companies are held liable for errors in transmitting a message, as for omitting an important word, or for non-delivery of the message, these being prima facie evidence of negligence. (79 Me. 493.) That is, the liability attaches on proof of negligence, and failure to transmit correctly a message which is not obscure is prima facie negligence. (Telegraph Co. v. Griswold, 37 Ohio St 301.)

Sec. 744. EXEMPTION FROM LIABILITY.—A telegraph company, equally with a common carrier, cannot stipulate to exempt itself from the results of its own negligence, such stipulations, or regulations, being contrary to public policy and void. (Telegraph Co. v. Griswold, supra.) So a stipulation in a telegraph blank that the company will not be liable for mistakes arising through the negligence of itself or servants, unless the message is repeated, is void as against public policy. (52 Ind. 1; 60 Ill. 421.) But such stipulations are held to relieve the company to some extent, but not for culpable negligence, fraud, or misconduct. They might excuse slight negligence. (109 N. Y. 235; 37 Mo. 473.) A later Missouri case holds the company liable for errors in a non-repeated message, though it had stipulated not to be responsible for errors unless the message was repeated.

The general rule may be stated to be that the company may make reasonable rules regarding its liability, as against responsibility for losses without the fault of itself or agents (45 Barb. 274; 35 Pa. St. 298), or only to become responsible for negligence occurring on its

own lines, where the message has been received destined to a point beyond its lines. So a company may limit its liability for mistakes in transmission unless the message is repeated at an extra charge, and for cipher or obscure messages, and may also limit the time in which a claim for losses may be made. (62 Pa. St. 84.)

Sec. 745. THE MEASURE OF DAMAGES.—The measure of damages is the loss suffered by the party through the mistake or non-delivery. (Bank v. West. U. Tel. Co., 30 Ohio St. 555; 44 N. Y. 263.) For an obscure or cipher message improperly transmitted only nominal damages can be recovered. (61 Tex. 458.) And damages to injured feelings can only be recovered as incidental to damages to person or property.*

*Effect of Mistake. The company is the agent of the sender and the party receiving the message has a right to rely upon its correctness, and this, though it is not what the sender originally gave the company to be transmitted; the sender is then compelled to sue the company to recover the loss the incorrect message has made him suffer. And as a rule, only the sender can sue on the contract with the company, but the receiver of the message has an action against the company for such damages as are caused him by the company's negligence. (See 23 Am. L. J. 285.)

QUESTIONS FOR STUDENTS

QUESTIONS FOR STUDENTS.

The questions are numbered to correspond with the sections in this book. The answers and references for further study may be obtained by referring to the corresponding sections.

AGENCY.

CHAPTER I.

551. What may be said in regard to Agency as a separate branch of law? With what was Agency confounded at common law?

552. Wherein does an Agency differ from an employment? Distinguish the subject from master and servant.

553. What may be said of the relation of Agency to Contract?

554. Give Mechem's Definition of Agency; Wharton's.

555. Define an Agent. Distinguish an agent from a servant.

556. Define a principal.

557. Give the various classifications of agents. Define a general agent; special agent; del credere agent.

558. How is it determined whether an agent's authority is general or special?

559. Name some agencies which are usually given separate consideration by writers. Define an attorney; auctioneer; broker; factor.

560. Give the plan of treating the subject in this book.

561. Name some of the leading authorities on the law of Agency.

CHAPTER II.

THE FORMATION OF THE RELATION.

562. Discuss the various ways in which the relation of principal and agent may arise from the assent of the parties.

563. Give the general rule as regards the purposes for which agents may be appointed; the exceptions to the rule.

564. Discuss the rule that an illegal or immoral act cannot be delegated. What classes of acts are forbidden to be delegated as against public policy? Are lobbying agents able to enforce their contract with the principal?

565. Why is the performance of acts of a personal nature forbidden to be delegated?

566. Give the general rule as to who may be principals. What is the rule as respects corporations? Partnerships? Who are not allowed to appoint agents?

567. What is the rule as respects who may become agents? Who is responsible for the selection of unfit persons to be agents?

568. What are the legal principles governing the appointment of infants as agents? Married women? Corporations? Partnerships? Aliens? Under what circumstances is the wife the agent of the husband? The husband the agent of the wife?

569. What is meant by joint Principals? Give examples. What are the principles governing the liability of members of unincorporated societies and clubs?

570. What are the rules governing the execution of the authority by joint principals? What exception to the rules?

571. How must the agent receive his authority as a general rule? What is the exception?

572. What is meant by an express appointment? What, if any, difference between parol and written appointment? When must the appointment be in writing? When under seal? What is the rule as regards acts done for the principal in his presence and by his direction?

573. What is meant by an implied appointment? What is the legal principle governing the presumption that an agency exists by authority of the principal? What limitation upon this assumption of agency by estoppel?

574. How may a corporation appoint agents?

575. Give the principles governing the proof of the agent's

authority. Is the agent a competent witness? Can the authority be proved by the agent's admissions, or the general repute of his agency? If the authority is in writing or undisputed, what is the rule?

576. Discuss what is meant by ratification. How may it occur?

577. Explain what acts may be ratified. What may be said as regards the ratification of a forgery?

578. Who, in general, may ratify acts done by an agent? What is the rule as to the agent ratifying acts of sub-agents?

579. Give and discuss the essentials of a valid ratification.

580. How may an act be expressly ratified? What is meant by implied ratification? Give instances where a ratification will be implied.

581. Explain and discuss the effect of ratification as between the principal and the assumed agent; the principal and the person dealt with by the agent; the pretended agent and the person dealt with, and as between the principal and innocent third persons.

582, 583. What is the general rule as to the delegation of his authority by the agent?

584. Explain the exceptions to the general rule as to the agent's right to delegate his authoriy.

CHAPTER III.

THE EFFECT OF THE RELATION.

585, 586. How is the agent's authority classified as regards its nature and extent?

587. What duty is imposed upon parties dealing with agents as respects their authority?

588. What is the general extent of the agent's authority? Are third persons bound to take notice of the general extent of agent's authority?

589. Give a summary of the agent's authority to act for the principal.

590. By what rules is the construction of the agent's authority regulated? Give a summary of the rules regulating the construction of agent's written authority. What rules govern the construction of parol express authority?

591. What is the general scope of implied authority? What other rules govern implied authority?

592. Explain and discuss the principles of construction

as applied to authority to sell land; to sell generally; to sell personalty; to purchase property; to receive payment; to make and indorse negotiable paper; to manage a business.

593. What are the chief duties of the agent in the execution of authority? What rules govern where he exceeds his authority?

594. Discuss the execution of sealed instruments for the principal by the agent. What is meant by "descriptio personae?" What rule was stated in Wood v. Goodridge? Has the rule been followed?

595. Discuss the rules governing the execution of simple contracts by an agent. Give and explain valid and sufficient forms of executing promissory notes by an agent. Give an example of an insufficient execution of a note intended to bind the principal. What general rules governing the admissibility of parol evidence, to explain the written instrument executed by the agent, are given by Professor Mechem?

CHAPTER IV.

THE RIGHTS, DUTIES AND LIABILITIES SPRINGING FROM THE RELATION.

596. How may the subject of the rights, duties, etc., of the relation be conveniently considered?

597. What in general are the claims of the principal to the agent's fidelity and loyalty? What principles arise from the fact that the agent is the "alter ego" of his employer?

598. If an agent discounts a claim upon his principal or makes a profit out of his employment other than his agreed compensation, to whom does such profit belong?

599. Discuss the effect of the agent's failure to obey instructions from the principal. What instructions may the agent refuse to follow?

600. What is the extent of the agent's duty to exercise skill and care in acting for the principal? What rule governs those agents who assume a special calling or profession? What are the duties of an agent to make collections? Of a bank to collect commercial paper? Of an attorney?

601. What may be said of the agent's duty to account for

receipts from the agency? When may he dispute the principal's title?

602. Of what facts must the agent notify the principal?

603. State the general rule as to the rights of third persons for neglect or nonperformance on the part of the agent.

604. How does the agent become responsible to third persons on contracts? What limitation in regard to the nature of the contract he may assume to make for the principal? What different actions has the third person against the agent? What is the rule where the agent conceals his authority? Explain the principles applying when money is paid the agent by mistake and by him paid to the principal; when money is paid by the principal to the agent for third persons.

605. Discuss the nature of the agent's liability to third persons for his torts while conducting his employment.

606. Explain the difference as respects liability, of public officers or agents, and private agents, to third persons.

607. Name the general duties the principal owes to the agent.

608. What may be said of the principal's duty to compensate the agent? How is the amount determined?

609. When the agent stipulates for full performance, give the rules respecting his right to compensation for part performance. What difference does it make whether the agent's authority is rightfully or wrongfully revoked by the principal? What is the rule when the agency terminates by operation of law? By abandonment by the agent? Explain what will and what will not constitute abandonment by the agent. For what other reasons may the agent forfeit his right to compensation?

610. For what is the agent to be reimbursed? From what is he indemnified?

611. What principles govern the agent's right to protection from injury in the employment? Name some of the principal's duties in this connection.

612. Discuss the agent's lien as given by the common law. Explain what is meant by a general lien? A particular lien? What is covered by the agent's lien? What classes of agents are given a general lien? Explain what is meant by the right of stoppage in transitu.

613. When is the principal obligated to sub-agents? To what extent?

614. In what characters does the principal become liable to third persons?

615. What is the general rule as regards the liability of an undisclosed principal to third persons? Give and explain the exceptions to the rule.

616. To what extent is the disclosed principal liable to third persons? To what extent are the agent's representations and admissions binding on the principal? What explanation or exception to the rule? Explain and discuss the rule that notice to the agent is notice to the principal. When is the principal not bound by the knowledge of the agent? Give the application of the rule, as to notice, to corporations.

617. To what extent is the principal liable for the agent's wrongful acts? What is the principal's liability for the acts of an independent contractor? What is the measure of principal's damage when he is liable?

618. Discuss fully the principal's civil liability for the agent's criminal acts; his criminal liability? For what sort of crimes may the principal become liable though committed by the agent, and without the express knowledge or consent of the principal?

619. To whom are third persons primarily liable on contracts made with an authorized agent? When is the third person bound to the agent? State the principles governing when the agent wishes to show himself to be the real principal. When the agent sues in his own name what defenses may the party set up?

620. When is the principal unable to sue upon contracts made by his agent? What limitations on the right of the principal to sue on his agent's contracts?

621. When may the principal reclaim money paid by the agent to third persons?

622. What are the principal's rights against third persons who have secured his property from the agent? When is the principal estopped from recovering property disposed of by his agent? When is possession by the agent sufficient evidence of his authority to authorize a valid transfer by him? Can the principal recover his property taken for the agent's private debts?

623. Discuss the principal's right to recover from third persons for their torts in respect to the agency.

624. When do third persons become liable with the agent for a fraud by the agent upon his principal?

CHAPTER V.

THE TERMINATION OF THE RELATION.

625. State the different methods in which an agency may be terminated.

626. Discuss termination by expiration of time.

627. What is the general rule as to the principal's power to revoke the agent's authority?

628. Discuss the nature of the interest which will prevent the principal from revoking. Give examples of what is and what is not such an interest in the agent.

629. Distinguish between the principal's power and right to revoke the agent's authority. What is the result of the exercise of the power to revoke without the right to do so?

630. In general, when may the principal rightfully revoke the agency?

631. Discuss the method of revoking the agency. Must the revocation be express? When will revocation be implied?

632. To whom must notice of revocation be given to make it effectual? What notice must be given as a general rule? When must the notice be put on record?

633. What is the rule as to the agent's power to renounce his authority? What notice should be given?

634. What is meant by the agency terminating by operation of law?

635. What effect has the death of the principal upon the agency? What class of agencies cannot be revoked by the death of the principal? What is the effect of the death of a joint principal?

636. Discuss the effect upon the agency of the death of the agent.

637. What effect on the agency has the insanity of the agent or principal?

638. What is the effect of the bankruptcy of the principal upon the agency? Of the agent?

639. What is the effect of war between the countries of the principal and agent?

640. Discuss the effect of the marriage of the principal upon the agency.

CHAPTER VI.

SPECIAL CLASSES OF AGENTS.

641. What classes of agents are considered under this head?

642. Discuss the nature of the relation between attorney and client. What presumption is made as regards the authority of an attorney to act for a client?

643. Define an attorney-at-law and give the general extent of his implied authority when employed to manage the client's cause. What in general has the attorney so employed no implied power to do? What may be said as respects the attorney's power to delegate his authority? To receive payment?

644. What is the duty of the attorney as respects representing interests adverse to his client? What is his duty as respects using skill in the management of his client's affairs. What is his responsibility to third persons? When is he liable to third persons for torts in respect to his employment?

645. Discuss the claims of the attorney upon the client. How is the attorney's compensation estimated in the absence of express agreement? When may the client discharge the attorney?

646. Discuss the attorney's lien for services. Define each, and distinguish between a general or retaining lien, and a particular or charging lien. To what does each extend to protect? Is possession necessary to the charging lien?

647. In general, what may be said as to confidential communications between attorney and client?

648. Define and discuss auctioneers. What is the extent of their implied powers?

649. What may be said of the duties and liabilities of the auctioneer?

650. What are the rights of the auctioneer as against the principal? As against a wrong-doer?

651. Name and define the various sorts of brokers.

652. What may be said as to the appointment and implied powers of brokers?

653. Discuss the duties and liabilities of brokers.

654. How is the broker's compensation usually estimated? Is the principal denied the right to revoke the broker's

authority to act? Has the broker a lien for his commission? What are his rights as against third persons?

655. Who are factors? What may be said of their appointment and implied powers?

656. To what extent are factors required to exercise skill, diligence and prudence?

657. What are the rights of the factor as against the principal? As against third persons?

THE LAW OF BAILMENTS.

CHAPTER I.

658. Define and discuss a Bailment. What is the nature of the contract as a rule? Distinguish between bailor and bailee. What is the importance of bailment law, and why?

659. What may be said as to the history of bailments? What is the leading case in the early law of bailment? What was decided in the case?

660. Distinguish a bailment from an equitable trust.

661. How is a bailment distinguished from a contract of sale? Give examples of bailments sometimes confused with sales. When a chattel is received for use with the privilege of purchasing, is this a bailment or sale?

662. How does the author divide the subject for treatment?

663. Name some of the writers on bailment law.

CHAPTER II.

GENERAL PRINCIPLES AND CLASSIFICATIONS.

664. Who in general may make a bailment or become a bailee?

665. When does the bailee become liable for a conversion of the bailed property? Give examples.

666. What may be said as to the subject-matter of bailment contracts? What sort of property may be bailed?

667. What may be said as to delivery in bailment? What two kinds of delivery? Explain each.

668. Who may deliver property in bailment?

669. When, in general, is the bailee bound by the delivery

of property in bailment? Explain what is meant by "quasi bailment" and a constructive bailee.

670. Will a wrong-doer or tresspasser who gets possession of property be considered a bailee of it?

671. Discuss the bailment contract. How does the implied contract arise?

672. What constitutes the consideration in the contract of bailment?

673. Who retains the title to the bailed property? To whom does the increase of bailed property belong? What is the nature of the bailee's right to the property?

674. Should the bailor notify the bailee of dangers possible in the bailment service?

675. Discuss the methods in which the contract of bailment may be terminated.

676. What is said as to the classifications of bailments by various authors? What two general classifications are given?

677. What is meant by the Roman Classification? Give and define each of the different bailments in this classification.

678. Give and define the different sorts of bailments in the English Classification.

679. What is meant by a gratuitous bailment? What other classification is rendered necessary by the distinction between paid and gratuitous bailees?

680. What is meant by "diligence" and "negligence?" Give and explain the degree of each.

681. What other elements assist in determining what degree of care should be exercised by the bailee? Who determines, as a rule, the question whether due diligence has been exercised by the bailee?

682. What may be said as to when a bailment is to be deemed gratuitous?

683. Discuss the liability of a depositary. When has the depositary a right to use the bailed article?

684. Give examples of who are depositaries. Discuss the rules applicable to the finders of lost articles. What is the liability of a bank for special deposits?

685. What is the extent of the liability of a mandatary? What is the rule as to services rendered gratuitously by an attorney or physician as respects art and skill required?

686. What is the rule of liability of the borrower of prop-

erty? For whose benefit is the bailment known as commodatum or gratuitous loan?

687. What distinction in regard to the termination of a loan at the common and civil law?

688. Discuss a pledge bailment. What is the purpose of the bailment? What degree of diligence is required of the pledgee, and why? What rights has the pledgee in the pledged property?

689. How is a pledge distinguished from a chattel mortgage?

690. What kinds of property may be pledged? Who, in general, may pledge property?

691. What is the importance of delivery in a pledge bailment? What are the general principles governing a constructive delivery in pledge?

692. What are the rights of the pledgee as respects using the pledged property? How may he realize the amount of the claim from the pledged property? What is the extent of his right to retain pledged articles?

693. What is meant by "mutuum?" Is it a bailment?

694. Give and explain the divisions of hired services? Define a warehouseman and state the rules governing his liability for the stored property. Who are "wharfingers?" What is the extent of their duty and liability? Who are "agisters," and what degree of care must they exercise in caring for bailed property?

695. Give the general rule as to the care required of bailees for hire.

696. What is the right of the bailee to compensation for services performed upon articles? If the service contracted for is not completed what is the rule?

697. Discuss the bailee's lien upon the bailed property for services rendered. To what does the lien extend? How may it be lost or waived?

CHAPTER III.

EXCEPTIONAL BAILEES CONSIDERED.

698. What is meant by "exceptional bailees," and why are they so called? Mention the chief ones considered.

699. Define an innkeeper. What change in the law as respects the keeping of the traveler's horse?

700. Mention some classes of persons who furnish enter-

tainment or lodging and are not deemed innkeepers. What is the rule as respects sleeping-car and steamship companies?

701. Discuss the innkeeper's liability. Is he an insurer of the guest's property? For what losses is he not liable?

702. To what property of the guest does the liability of the innkeeper extend? When does he become liable for the property?

703. Discuss the liability of the innkeeper for injuries or insults to the person of the guest?

704. What are the duties imposed upon an innkeeper by reason of his public calling?

705. How is it determined who are guests? Give instances of who are and who are not considered guests.

706. How long does the innkeeper's liability to the guest continue? May the liability for the guest's property continue after the departure of the guest? Give instances.

707. State the circumstances or conditions under which the innkeeper may be relieved for losses to the guest's property.

708. What statutary limitations have been enacted governing the liability of innkeepers in your State?

709. Give the remedies which the innkeeper has for securing pay for his services. Discuss the innkeeper's common law lien. How is this lien enlarged by the statutes of your State?

710. What is the status of a postmaster? Who is the real bailee?

711. What is the general rule of liability of government officers? Are they liable to individuals for the performance of official acts?

712. What exceptions to the general rule as to the liability of the postmaster or his assistants for fraud or willful misconduct in office? For what duties must the postmasters respond in damages to the individual if left unperformed? What other officers are governed by the same rules applicable to postmasters?

713. Define carriers. What two classes of carriers?

714. Define a private or special carrier. Give an instance of one.

715. What is the extent of the special carrier's liability?

716. Define a public or common carrier. Give the elements necessary to constitute one a common carrier.

717. Give instances of special agencies deemed common carriers.

718. Give examples of transporting agencies not deemed common carriers.

719. When does the obligation and liability of the carrier attach?

720. Discuss the nature of the delivery of goods to the carrier as respects its sufficiency.

721. What in general are the rights and duties of the carrier as regards receiving and transporting the goods?

722. What term is commonly used to designate the common carrier's liability? Is it strictly accurate? Give the exact rule governing his liability. Why does the law require excessive responsibility from common carriers?

723. What is meant by and included under "act of God?" Give examples of what are and what are not considered losses from "inevitable accident."

724. Discuss what is meant by "public enemies."

725. What further things may be shown to excuse the carrier? What is the carrier's liability as regards taken from him by judicial process?

726. Discuss the carrier's right to limit his liability by special contract with the shipper. Give instances.

727. May the carrier limit his liability by public notice?

728. Discuss the rules applying when the carrier seeks to limit his liability by receipt or bill of lading.

729. What may be said as to statutory regulations of common carriers?

730. Discuss the rules applicable to connecting carriers.

731. Give the rules in respect to the duty to furnish transportation for freight offered, and to transport according to instructions or by usual route. When is the carrier excused for delay in delivery?

732. What may be said as to the requirements of the carrier to deliver the goods personally to the consignee? What notice is required in the absence of personal delivery? Is the carrier held to deliver to the right person?

733. What will excuse non-delivery by the carrier?

734. Define and explain "stoppage in transitu."

735. Discuss the right of the carrier as respects the goods shipped.

736. Explain the nature of the carrier's lien for freight and advances.

737. What rule prevails in some States as respects carriers of live stock?

738. Discuss the general principles applicable to carriers of passengers. How and when does a person become a passenger?

739. When may the carrier eject a passenger, and how?

740. May a carrier of passengers limit his liability for negligence?

741. Discuss the carrier's liability for passenger's baggage.

742. Explain the general liability of the carrier for negligence.

743. Are telegraph and telephone companies common carriers? What is the extent of their liability?

744. Discuss their right to exempt themselves from liability for negligence.

745. What is the measure of damage for failure to send a message correctly, or for non-delivery?

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